The farmer now has legislative assurance that the generous provisions of Section 117(j) will be applied to two broad classes of farm transactions.

Some of the provisions of the Internal Revenue Code, some of the Commissioner's Regulations, and some court decisions have, at one time or another, served to benefit farmers as a taxpaying class. The same or similar Code provisions, Regulations, and court decisions have undoubtedly benefited many other classes of taxpayers in a like fashion. An appraisal of the economic consequences of this variety of benefits in the tax system would be difficult, if not impossible; and perhaps the very difficulty of such an appraisal is a forceful argument against Code provisions, Regulations, and court decisions which accord special treatment to a chosen class of taxpayers.

LIVING EXPENSES WHILE "AWAY FROM HOME": BUSINESS OR PERSONAL?

Section 23(a)(1)(A) of the Internal Revenue Code provides that when an expenditure is incurred in the pursuit of a business venture, as distinguished from personal gratification, it is deductible from gross income. Before 1921 it was held by the Bureau of Internal Revenue and the courts that although transportation expenses incurred on business trips were deductible, expenditures made for meals and lodgings during such trips were not. In 1920 a regulation of the Bureau made deductible expenses for meals and lodging in excess of what the taxpayer would ordinarily pay for these personal needs when at his established residence. In 1921 an amendment to a statute comparable to Section 23(a)(1)(A) explicitly provided for the deduction of meals and lodging expenses by enlarging the business expense category so as to encompass all "traveling expenses (including the entire amount expended for meals and lodg-

used in the trade or business," in computing net income no deduction ... attributable to the production of such crop shall be allowed." For a survey of the problems which may arise under §§ 117(j)(3) and 24(f), see Halstead, Capital Gains of Farmers, 25 So. Calif. L. Rev. 36, 47 et seq. (1951).


2 The section provides that in computing net income there shall be allowed as deductions: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business..." Ibid. In contrast, Section 24(a)(1) states that no deduction shall be allowed for "[p]ersonal, living or family expenses..." Int. Rev. Code § 24(a)(1), 26 U.S.C.A. § 24(a)(1) (1948).


4 T.D. No. 3101, 3 Cum. Bull. 191 (1920). This ruling amended Treas. Reg. 45, Art. 293 (1920) which had stated that expenses for meals and lodging on business trips were not fully deductible. Accord: 10 B.T.A. 386, 389 (1928); Mim. 2688, 4 Cum. Bull. 209 (1921). A person claiming a traveling expense deduction was required to attach to his return a statement setting forth the cost of personal expenses had he lived at his residence. All business traveling expenses in excess of that amount were deductible.
ing) while away from home in the pursuit of a trade or business." Legislative history indicates that this wording was added to allow greater deductions for traveling salesmen because "it was thought that their traveling expenses were a matter of proper deduction and that their meals and lodging should be included in such deductions." In the debates concerning this amendment some legislators expressed a fear that deductions would be allowed in situations not contemplated by the authors. This Congressional concern seems now to have been justified, for the courts and the Bureau have experienced considerable difficulty in construing the amendment.

Early in the course of tax litigation, trouble arose in applying the "away from home" criterion to the common situation in which a taxpayer maintained his residence in one locality but had his place of employment or business in another vicinity. In light of the underlying rationale of Section 23 (a)(1)(A), it seemed that Congress did not intend to allow as a business expense deduction expenditures incurred by reason of a taxpayer's personal preferences for living away from his place of business. Since daily commuting expenses had always been disallowed, it was said to be manifestly discriminatory to allow comparable deductions to a man who chose to maintain his residence beyond daily commuting distance from his place of business. To avoid the consequences of a literal interpretation, some courts held a taxpayer to be "away from home" within the meaning of the amendment "only while away from his place of business, employment, or post or station at which he is employed." While this interpretation resulted in denying traveling expense deductions to a taxpayer

5 The amendment was added to Section 214 (a)(1) of the 1921 Act. See Seidman, Legislative History of Federal Income Tax Laws 822 (1938).

6 61 Cong. Rec. 6673 (1921). To the same effect are speeches in 61 Cong. Rec. 5301 (1921).

7 Senators displayed concern that the entire living expenses of Congressmen in Washington, D.C. would be deductible. 61 Cong. Rec. 6673 (1921). This angered some, and Mr. Williams of Arizona retorted: "I will undertake now to say that no full-blooded American in any department, even though he calls himself an expert, will ever issue a departmental decision that my duties as a Senator constitute a trade, and that the public business to which I pay my attention in my inefficient way is my private business." Ibid. But Mr. Watson of Indiana answered that concerning the transaction of the business in which Congressmen were concerned, Washington was their "home," in the pursuit of that business. Ibid.

8 The authorities are reviewed in Barnhill v. Comm'r, 148 F. 2d 913 (C.A. 4th, 1945). In Laubscher v. Comm'r, 3 T.C.M. 1025, 1028 (1944), the court remarked: "If 'home' as used in the statute were construed as equivalent to 'domicile' a large part of the population of the District of Columbia, and perhaps of New York City, would be in a position to contend that their expenses of living should be deducted from income subject to tax by virtue of Section 23 (a), since their formal domiciles are in states other than the state or district in which their place of business or employment is."


who maintained a residence away from his sole place of business, it created some conceptual problems when applied to slightly variant facts. A traveling salesman whose business traveled with him could never be “away from home” under this definition unless some particular place, such as his residence, if he maintained one, or his employer’s main office, were to be considered his “place of business” and consequently his “home.” Similarly, since he was always at a place of business and therefore never “away from home,” a taxpayer who had two places of business and traveled between them could not receive a deduction unless further criteria were established to determine which place of business was his “home” for purposes of the amendment.

I

Interpreting “home” to mean “place of business” did not explain why traveling expenses were not allowed as deductions in cases where the taxpayer’s sole place of business was away from his residence. It stated a conclusion which the courts might have reached without changing the usual meaning of “home.” This was pointedly illustrated by the Supreme Court in Commissioner v. Flowers when, in 1946, it considered the traveling expense amendment for the first time. The Court affirmed the Tax Court’s decision that an employee’s desire to maintain a residence in Jackson, Mississippi, when his entire work could have been performed in Mobile, Alabama, was unnecessary to the conduct of the employer’s business in Mobile. Writing for the majority, Justice Murphy enunciated three conditions to be met before traveling expenses could be deducted. The expense must be (1) reasonable and necessary, (2) incurred while away from home and (3) incurred in the pursuit of a trade or business, which meant in direct connection with, and essential to, the development and pursuit of the business or trade. Finding that personal convenience motivated Mr. Flowers to keep his place of business more than a commuting distance from his residence, the Court held that failure to satisfy the third of the three conditions justified denial of the traveling expense deduction which he sought.

Although noting the conflict in the courts over a proper meaning for “home,” the Supreme Court stated that it was not necessary to define that term in the Flowers type of situation. The Court indicated that whether the taxpayer is “away from home” is irrelevant until a preliminary test—whether the particular expense is required by the inherent nature of the business—has been

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23 Ibid., at 470.
24 Ibid., at 472. The Courts of Appeal had split on a proper interpretation. The Fifth Circuit, which had held for the taxpayer in the Flowers case, Flowers v. Comm’r, 148 F. 2d 163 (C.A. 5th, 1945), and the Ninth Circuit, in Wallace v. Comm’r, 144 F. 2d 407 (C.A. 9th, 1944), thought that the word “home” was to be understood and applied in its ordinary sense and that the Tax Court had invaded the domain of Congress in construing “home” in some other manner. The Fourth Circuit, in Barnhill v. Comm’r, 148 F. 2d 913 (C.A. 4th, 1945), sided with the Tax Court in interpreting “home” as “place of business.”
Implicit in this test and in the Court's contrast of "business expenses" with "personal expenses" is the crucial question whether, for business reasons alone, the taxpayer has been required to expend amounts over and above what he would ordinarily spend to satisfy his personal needs. Commenting on the Flowers case, some writers thought that the proponents of "the view that home means place of business had won their point, indirectly if not directly." Further reflections on other factual circumstances will, however, demonstrate that this is not necessarily true.

Prior to the Flowers case it had been agreed that a taxpayer who temporarily left his residence in pursuit of his sole business could take a deduction for traveling expenses incurred on his temporary trip. It was conceptually simple to allow deductions where the taxpayer's business had a single location near his place of residence. Since the same result would follow whether "home" was given its popular meaning or interpreted to mean "place of business," it did not matter what definition was given to "home." As indicated above, the situation where the taxpayer's business had no definite location presented greater difficulty, however. In such a case, decisions before the Flowers case either rejected "place of business" as a synonym for "home" or formulated another definition of "home," such as "the place where he [taxpayer] is regularly employed or customarily carries on business during the taxable year." Decisions subsequent to the Flowers case have continued to allow deductions where the taxpayer takes his place of business with him. The Tax Court has said that temporary changes of the place of business may lead to "unavoidable, reasonable, and necessary expenses while away from his 'home' in the pursuit of [a] trade." Implicit in such reasoning is the notion that "home" under the


16 See Vickrey, Agenda for Progressive Taxation 35 (1947).

17 Deduction of Traveling Expenses, 32 Cornell L.Q. 451, 455 (1947). Dissenting in the Flowers case, Justice Rutledge stated that the majority opinion in effect held that "home" means "place of business." 326 U.S. 465, 479 (1944).

18 E.g., Penn v. Robertson, 29 F. Supp. 386 (M.D. N.C., 1939) (traveling expenses of corporate director); Potter v. Comm'r, 18 B.T.A. 549 (1929).

19 Text following note 11 supra.

20 Coburn v. Comm'r, 138 F. 2d 763, 764 (C.A. 2d, 1943) (Hollywood living expenses of actor, whose residence and theatrical employment were in New York, incurred while acting in a motion picture for 263 days in 1938). Accord: Schurer v. Comm'r, 3 T.C. 544, 546 (1946) (A). (In allowing deduction of the living expenses of a journeyman plumber while away from his residence, the Tax Court disregarded its previous interpretation of "home" as place of business and asserted that each "case . . . must be decided upon its own facts.")

21 It is obvious that temporary business trips by the taxpayer whose stationary business is located at his residence remain unaffected by the Flowers case if the trip is required by the needs of the business.

22 Leach v. Comm'r, 12 T.C. 29, 21 (1949) (taxpayer was required to be away from his residence for 49 weeks during the tax year in connection with his work for a construction company).
Flowers case need not mean "place of business." Many decisions in this area have hinged upon a factual determination as to whether a particular business trip was for an indefinite time as distinguished from a temporary period. The cases are agreed in theory that if the trip is for a temporary period, the taxpayer is entitled to a traveling expense deduction because, it is said, he cannot be expected to uproot an established residence for a temporary absence. Hard and perhaps somewhat arbitrary factual distinctions have resulted in a denial of traveling expense deductions when the court decided that the business trip was of an indefinite nature, for, then, maintenance of a residence away from the new business location was thought to be for the taxpayer's own convenience, as in the Flowers case.

II

Closely akin to the "temporary-absence" situations are cases in which a traveling salesman seeks a deduction for his living expenses while traveling. Early decisions under the amended section allowed a traveling salesman to deduct his traveling expenses, including meals and lodging while away from an established residence. One case reached a contrary result for a salesman who had no established residence. In Duncan v. Commissioner the taxpayer, a traveling salesman, worked on a commission basis paying all his transportation and living expenses. He lived in different cities which he made his headquarters for the time; but he claimed as his residence a certain hotel to which his wife, who lived at a hotel in another state because of ill health, sometimes came (when he was there). The Board of Tax Appeals disallowed his deduction of expenditures for meals, lodging and laundry while away from his alleged residence. Stating that the taxpayer had not shown that these expenses were "in excess of those ordinarily required when not engaged in such business," the court could find no Congressional intent to "allow as deductions, all the year's expenses for meals, lodging... incurred by a taxpayer who traveled on a

23 Mahoney v. Comm'r, 4 T.C.M. 395 (1945); Shelley v. Comm'r, 4 T.C.M. 668 (1945).

24 Waugh v. Comm'r, 9 T.C.M. 600 (1950); Pennington v. Comm't, 9 T.C.M. 955 (1950). Many cases have involved claims for deductions of living expenses incurred while the taxpayer was employed by the government or by private war plants away from his residence for the duration of World War II. In each case the courts held this employment to be of an indefinite nature. E.g., Andrews v. Comm'r, 179 F. 2d 502 (C.A. 4th, 1950); Warren v. Comm'r, 73 T.C. 205 (1949); Locke v. Comm'r, 8 T.C.M. 1002 (1949); Johnson v. Comm'r, 8 T.C. 303 (1947).

With Leach v. Comm'r, 12 T.C. 20 (1949) (note 22 supra), compare Jones v. Comm'r, 13 T.C. 886 (1949). In the Jones case the taxpayer left his residence when sent by his employer, a construction company, to work on the atomic energy project at Oak Ridge, Tennessee. He worked there for 357 days of 1945 and returned home in 1946. Two judges vigorously dissented from the majority's view that the Oak Ridge construction work was of an indefinite duration. For further "hard" cases: Tyler v. Comm'r, 13 T.C. 186 (1949); Bryson v. Comm'r, 7 T.C.M. 77 (1948); Bark v. Comm'r, 6 T.C. 851 (1946).

25 Appeal of Burgio, 4 B.T.A. 4 (1926); Appeal of Sonenblick, 4 B.T.A. 986 (1926).

26 17 B.T.A. 1088 (1929), aff'd without opinion, 47 F. 2d 1082 (C.A. 2d, 1931).

27 Ibid., at 1092.
roving commission, with headquarters wherever he happened to be. At first glance Mr. Duncan's living expenses would seem to have been deductible under the "pursuit of business" test later posited in the *Flowers* case, for his trips, unlike those of Mr. Flowers, were required by the nature of his business. Since Mr. Duncan had no living expenses at "home," however, it might properly be said that he had no additional expenses (aside from transportation costs) attributable to the nature of his business, despite the fact that his occupation required traveling. Apparently the *Duncan* court felt that a rule denying all deductions for living expenses was necessary to place persons without a permanent place of abode on a par with persons who maintain such a residence, the expense of which is considered personal and therefore non-deductible.

Subsequently, however, the Tax Court became more liberal in its treatment of the living expenses of a traveling salesman without an established residence. In two cases the Tax Court granted such salesmen a living expense deduction on the theory that "home" was his employer's place of business. Similarly, in *Gustafson v. Commissioner* an unmarried traveling salesman was permitted to deduct all his traveling expenditures for food and lodging upon the ground that he had a permanent "home" at his sister's residence in Greenville, Iowa, some miles from his employer's "home office" in Des Moines. Mr. Gustafson traveled all year round, returning to his sister's residence (where he paid nothing) for only two weekends out of the entire tax year. Despite the fact that the taxpayer had no additional "home" expenses, the Tax Court granted a full deduction because the statute gave no ground "for substituting a hypothetical home living expense as a non-deductible amount and limiting the deduction to the artificial excess," but, rather, "[t]he statute expressly provides for the deduction among traveling expenses of the entire amount expended for meals and lodging and no part of such entire amount may be treated as living expenses, even though . . . no actual home living expenses be included in the deduction." Clearly the *Gustafson* case counters most of the implications of the *Duncan* case.

28 Ibid., at 1091. The *Duncan* decision was often cited as the leading case concerning the traveling expenses of a taxpayer who had his home "in his hat" and had no permanent place of abode. It was said that such a taxpayer could receive no deduction for living expenses incurred on his trips since "he was never away from home because his home was wherever he might be." 4 Mertens, Law of Federal Income Taxation § 25.82 at 476 (1942).

29 Note 2 supra.

30 Murphy v. Comm'r, 1 T.C.M. 757 (1943); Smith v. Comm'r, 2 T.C.M. 837 (1943).

31 3 T.C. 998 (1944).

32 Ibid., at 1000.

33 Ibid. Consult Murphy v. Comm'r, 1 T.C.M. 757 (1943). Here the taxpayer incurred traveling expenses of $1,080 during the tax year. He assumed that if he resided in one location his living expenses would not have been in excess of $600 a year, and accordingly he sought a deduction of $480. Since the court had stated that the taxpayer's "home" was the city where his employer lived, presumably he could have had a deduction for the full $1,080 had he claimed this amount.
decision. The cases are undoubtedly distinguishable on the narrow ground that the Tax Court was able to find a "home" for Mr. Gustafson, something it was unable to find for Mr. Duncan. But the concept of "home" in the Gustafson case is all-embracing—it may mean simply the place where the taxpayer leaves some of his luggage, where he votes or pays taxes, where his employer's business is located, or a combination of these. Probably most traveling salesmen, including Mr. Duncan, could satisfy the "home" requirement if the test is thus formulated. But defining the word "home" throws little light on the rationale for allowing or disallowing a deduction.

Hence, the underlying conflict between these two decisions is not in their definitions of "home" but rather in the treatment each affords to expenses obviously personal in nature but larger than usual, not through personal choice but directly as a result of business necessity. The Duncan court seems to have thought that whatever additional expense in meals and lodging was caused by the transient nature of the taxpayer's business was not sufficient to justify the discrimination between taxpayers which would have resulted if Mr. Duncan has been allowed to deduct all of his living expenses. By the time the Gustafson case was decided, the Tax Court apparently had become convinced that Congress thought the increased expenses for meals and lodging when traveling continuously in strange localities justified such discrimination. The obvious administrative difficulties entailed in apportioning the cost of a single item (e.g., a meal in a railroad diner) between its business and personal aspects may have influenced both courts in their adoption of an "all-or-nothing" rule.

Aside from their different definitions of "home," there is much to say for both decisions as a matter of statutory interpretation. The Gustafson case adopts a more literal construction of the "traveling expense" amendment, treating it as a specific exception to the broad language of Section 24(a) and allowing a full deduction wherever the living expense while traveling on a trip can be shown to have been incurred in pursuit of business. It is possible that Congress, too, was impressed with the administrative difficulties in a grant of only partial deductibility.

The Duncan decision treats the amendment as logically harmonious with both the reasonable and necessary business expense deduction and the non-deductibility of personal expenses and, therefore, applicable only where business necessity requires the taxpayer to duplicate his personal expenses. A logical extension of the Duncan reasoning from the "no single residence" to the "temporary absence" situations, however, would result in complete deductibility of lodging expenditures but non-deductibility of meals expenditures which are rarely duplicated (although possibly increased) by the necessity of traveling. Clearly the language of the amendment purports to allow some de-

34 "In computing net income no deduction shall in any case be allowed in respect of—(1) Personal, living, or family expenses...." Int. Rev. Code § 24 (a) (1948), 26 U.S.C.A. § 24 (a) (1948).
duction for meals; and both legislative history and administrative practice indicate that the prior law, which allowed only a partial deduction, was thought to have been changed in favor of full deductibility in the "temporary absence" situations.\(^{35}\)

As a matter of statutory interpretation, however, it does not follow from the inapplicability of the Duncan rationale to "temporary absence" situations that the court in that case reached an incorrect result in the "no single residence" situation. According to the Senate Report on the "traveling expense" amendment there was no intent to alter the prior law except to allow full deductibility where only partial deductibility could be had before.\(^{36}\) Since a traveling salesman without living expenses at a place of residence could deduct no part of his living expenses incurred on business trips before the 1921 amendment,\(^{37}\) there is reason to believe that the amendment was not intended to affect such salesmen. This interpretation is borne out by a ruling of the Bureau immediately after the amendment\(^{38}\) and by a recent case in which living expense deductions of a theatrical manager who traveled between theatres and had no established residence were completely disallowed.\(^{39}\)

Although the legislature may ultimately find it necessary to resolve the mixed conflict of policy and statutory interpretation which underlies the Duncan and Gustafson rulings, it is probable that the results in "no single residence" cases will continue for some time to hinge upon the definition of "home." According to the Duncan case, "home" is an established permanent residence where the taxpayer is incurring some costs, while in Gustafson the residence need not be established, it apparently being sufficient if the taxpayer has some particular locale where he would live if he were not traveling.

A court's choice in interpreting the amendment may depend in turn on

\(^{35}\) Note 37 infra.

\(^{36}\) The Report of the Senate Finance Committee, Sen. Rep. No. 275, 67th Cong. 1st Sess. 14 (1921), had this to say: "Section 214 [now Section 23 (a)(i)] allows substantially the same deductions . . . as are authorized under existing law, but adds the following provisions: (i) The deduction . . . is extended to include all traveling expenses incurred while away from home in the pursuit of a trade or business. . . ."


\(^{38}\) The Bureau asserted: "It has been held that a taxpayer for purpose of this deduction may have no home. . . . If a single traveling salesman maintains a house or other living quarters to which he may at any time return or which is at all times available for his use, he has a home within the meaning of the Act. . . . If, on the other hand, he does not have a home as above defined, such amounts are not deductible." I.T. 1499, 1922-2 Cum. Bull. 89.

\(^{39}\) Mitnick v. Comm'r, 13 T.C. 1, 4 (1949). The court stated: "Hence the evidence is not sufficient to justify any of petitioner's expenditures involved as traveling expenses while away from home in pursuit of a trade or business; his home being, so far as the record shows, wherever a particular show managed to be. The traveling expenses, therefore, were personal and not deductible. Section 24 (a), I.R.C." And see Martin v. Comm'r, 44 B.T.A. 185 (1941) (it was stipulated that the taxpayer maintained no residence in the United States; living expense deductions were denied). Diamond v. Comm'r, 7 T.C.M. 774 (1948) (taxpayer, a carpenter by trade, maintained no fixed place of abode during the tax year; expenses for meals and lodging were held to be personal in nature).
whether it feels that greater equity among taxpayers is achieved by allowing a
deduction of personal expenses because they have been increased by business
necessity or disallowing a deduction of business expenses which are inter-
mingled with personal expenditures.40

III

Another traveling expense situation in which the interpretation given
"home" has been at least superficially decisive involves the taxpayer with more
than one permanent business situs who maintains his residence at the location
of one of them. Prior to the Flowers case, the Board of Tax Appeals allowed
deductions for all traveling expenses incurred in connection with the business
located away from the residence of the taxpayer.41 In the only cases which con-
sidered this problem the taxpayer spent a nearly equal amount of time at each
of the two places of business,42 and a ruling of the Bureau indicates that the
Flowers decision is not considered to have altered the permissibility of deduc-
tions for living expenses at the business away from the residence in such cases.43

The influence of the Flowers case on the "two business" situation in which the
taxpayer does not spend a substantially equal amount of time at each busi-
ness location has not, however, been definitely established. In O'Hara v. Com-
missioner,44 the taxpayer was not permitted to deduct as traveling expenses

40 One explanation for the paucity of "traveling salesman" cases is the fact that formerly
an employee-salesman who was reimbursed for his expenses by his employer was not required
to report such reimbursements as income. Darling v. Comm'r, 4 B.T.A. 499 (1926); 1942-2
expense reimbursements and to deduct only substantiated traveling expenses, Treas. Reg. r11,
§ 29.23 (a)(2) (1950); but there is apparently no general enforcement of this requirement.
Under the old system it was (and is) difficult for the Bureau to detect expenditures not actu-
ally incurred in proper business pursuits, for this information could be gleaned only from a
thorough investigation of the employer's books. See generally Carder, The Salesman's Travel

41 Brown v. Comm'r, 13 B.T.A. 832 (1928) (taxpayer, a lawyer, spent half of every month
in Washington, D.C., as chairman of a Congressional committee, and remainder of the time at
his private practice in Toledo, Ohio; deductions allowed for Washington living expenses);
Powell v. Comm'r, 34 B.T.A. 655 (1936), aff'd 94 F. 2d 483 (C.A. 1st, 1938) (taxpayer, who had
his residence and business in Boston, spent three days of each week in New York City where
he managed two corporations; deductions allowed for traveling expenses including lodging
and meals while in New York). Cf. G.C.M. 23672, 1943 Cum. Bull. 66 (dollar-a-year man was
said to be entitled to deductions while living in Washington, D.C., when he had not severed
his connection with the private organization where he was regularly employed).

42 Ibid.

T.C. No. 152 (1952). The Johnson decision illustrates the applicability of the Flowers rule in
conjunction with the doctrine allowing deductions in the "two business" situation where the
taxpayer has spent nearly an equal amount of time at both places. The taxpayer's family resi-
dence was in Statesville, Tennessee, and his employers' home office was in Memphis. The em-
ployee taxpayer spent 50% of his working time in Memphis, and 50% of the time during the
tax year he worked at places away from Memphis but not in Statesville. The Tax Court
thought that the taxpayer's "home" for purposes of the amendment was in Memphis, and
therefore the taxpayer was allowed to deduct living expenses only for the time spent at a busi-
ness away from Memphis.

44 6 T.C. 841 (1946).
certain expenditures for meals and lodging in Harrisburg, Pennsylvania, where she performed duties as a state official in 1940 and 1941, though she maintained a residence in Wilkes-Barre where she returned on weekends to care for her law business. The Tax Court thought that the taxpayer's "principal place of business," her "home," was in Harrisburg, so that her expenses while living there were not deductible.\textsuperscript{45}

Similarly in \textit{Ney v. United States},\textsuperscript{46} a Court of Appeals stated that the living expenses of a resident of Fort Smith, Arkansas, incurred in Atlanta, Georgia, and Washington, D.C., as a result of his being employed by the Office of Price Administration, were not deductible, although he accepted employment only for the duration of World War II on the understanding that he would be free to confer with his associates about his private business and to visit his family and business in Fort Smith whenever necessary. He visited Fort Smith three to four days during every six to eight week interval. Although his private business drew him twice as much salary as his government position, the court denied him deductions for his living expenses while in Atlanta and Washington.\textsuperscript{47}

Although the \textit{O'Hara} and \textit{Ney} decisions are subject to different interpretations,\textsuperscript{48} the Bureau has apparently viewed them as establishing a rule that expenses incurred while the taxpayer is at his "principal" place of business are not deductible, while expenses connected with supervising the "minor" place of

\textsuperscript{45}The majority opinion also stressed the fact that the taxpayer was not really engaged in "active pursuit" of her law practice in Wilkes-Barre. The court remarked: "It seems to us that the petitioner's main interest in Wilkes-Barre during the taxable year was to continue old contacts and cultivate new ones for future use in the event she should decide to return to that city. ..." \textit{O'Hara v. Comm'r}, 6 T.C. 841, 844 (1946). So reasoned, the taxpayer had in reality only one place of business, that at Harrisburg, and her "home" for purposes of the amendment would be located there. Other decisions have stressed this point in denying deductions. E.g., \textit{Green v. Comm'r}, 12 T.C. 656 (1949); \textit{Nadeua v. Comm'r}, 8 T.C.M. 658 (1949); \textit{Tompson v. Comm'r}, 6 T.C. 285 (1946).

Writing for five concurring judges in the \textit{O'Hara} case, Judge Hill stated: "I... think that the conclusion herein should not be made dependent in part or at all on the location of petitioner's 'home.'... Making one's self available for work in the place where it is normally conducted on a permanent basis is the personal problem of the worker, and expenses to accomplish that purpose are not made in the pursuit of business within section 23 (a)(1)(A). Until that is done, the worker has not reported for duty and is pursuing the place of business rather than the business." \textit{O'Hara v. Comm'r}, 6 T.C. 841, 846-47 (1946). Evidently Judge Hill would also have denied deductions for living expenses of the taxpayer at Wilkes-Barre if she had sought to deduct them. This issue was not raised in the case; but under the "principal business" rationale of the majority, the taxpayer would seemingly have received a deduction for living expenses at Wilkes-Barre, since that was the business away from the taxpayer's "home."

Four dissenting judges agreed that the taxpayer should be allowed deductions for living expenses in Harrisburg because she continued to pay rent for her residence in Wilkes-Barre. Her position as a state official was said to be a "temporary occupation" while her legal practice "required her to continue to reside in Wilkes-Barre." Ibid., at 850.


\textsuperscript{47}The taxpayer, however, was allowed a deduction for transportation costs between Washington and Fort Smith.

\textsuperscript{48}See note 45 supra.
The criteria for determining which place of business is "principal" are manifold, one of the most important being the time element. The distinction between "principal" and "minor" place of business is more in accord with the Flowers decision than would be a rule permitting the taxpayer to deduct the expenses of living at any business away from his residence. Decisive in the Flowers case was the fact that personal convenience rather than business necessity motivated the taxpayer to establish his residence at a point distant from his place of business. To allow a taxpayer who spends but two months out of the year at an established residence where he also maintains a business to deduct living expenses for the ten months spent at another place of business would seemingly discriminate against Mr. Flowers. The taxpayer's refusal to establish a residence at a place where he lives ten months out of the year seems clearly motivated by personal convenience, not business necessity. But as was the case when "place of business" was first used by the courts as a synonym for "home," the "principal place of business" idea merely states a conclusion which does not articulate the major premises for allowing or disallowing the deductions. As in the "temporary absence" situations, it would seem simpler and wiser to employ the Flowers test of business necessity in applying Section 23 (a)(1)(A) to the "two business" situation, rather than to distort the word "home" beyond popular recognition.

Should the taxpayer in the "two business" example contend that if not allowed deduction for living expenses at the place of business where he spends ten months, he should be permitted to deduct the expenses of living at his two months business, the tax result may vary with the location of his established residence. In Sherman v. Commissioner, where the taxpayer's residence was at

50 CCH Tax Ct. Rep. 18,119, 16 T.C. No. 42 (1951). The taxpayer, who resided with his family in a house owned by him in Worcester, Massachusetts, was employed as production manager and purchasing agent for a factory located near Worcester. He opened a part-time sales business in New York in 1945 and during that year spent more time in Worcester (216 days) than in New York (102 days), but the profits realized from the New York venture ($3,340.94) exceeded his Worcester salary ($4,066.40). The court distinguished the O'Hara decision on the ground that in the latter case the taxpayer carried on an inconsequential degree of activity at one place of business. Mr. Sherman was held to have had his "principal place of business and home" in Worcester, and the fact that his Worcester earnings turned out to be less than his New York profits was held not sufficient reason to shift his "home" from Worcester to New York.

Four of the dissenting judges stated that the Flowers case had prescribed a concept of "business home" and went on to say: "In the instant case, the petitioner set up a business at a considerable distance from his home. This is the same situation as in the Flowers case and it is unaffected . . . by the fact that he also had a business (not his principal business so far as income is concerned) at his actual home." Ibid., at 18,120, 44.

Besides the time element, the Sherman decision indicates that several factors may be important in determining whether a taxpayer is justified in keeping his residence away from a particular place of business. Among these are: the income earned at each place of business, whether the shift to a new business location is temporary or permanent, and whether the taxpayer has an established family residence at one place of business.
his "principal" place of business, the Tax Court allowed a deduction of his living expenses while at the "minor" place of business. Although there are no adjudications on the point, a contrary result might obtain where the taxpayer's only established residence is at his "minor" place of business. If the rationale of the Duncan case is extended to this situation, no deduction will be allowed, for there will be no duplication of living expenses while the taxpayer is at his "minor" place of business unless he also maintains a year-round residence at the "principal" place of business. An analogy to the Gustafson case, however, would probably result in a deduction of living expenses at the "minor" business even if there is no actual duplication of expenses, because the Commissioner has established a "home" for the taxpayer at his "principal" place of business. Thus far the Bureau has committed itself in this situation only to allow deductions of transportation expenses to and from the taxpayer's residence if incurred in pursuit of the "minor" business. Finally, when the taxpayer has no established residence, the Duncan-Gustafson conflict of the "no single residence" cases will be likely to arise.

As in the "temporary absence" and "no single residence" situations, there is no reason why "home" need be given a distorted definition in cases where the taxpayer has two places of business. To determine whether business necessity or personal convenience has motivated a taxpayer in locating his established residence ("home" in the popular sense), the same criteria which distinguish a "principal" from a "minor" place of business must be looked to. But to allow or deny traveling expense deductions, it is not necessary to create a fiction that the taxpayer's "home" is at his principal place of business; for if he has failed to locate his residence near the business requiring the majority of his time and attention, then his choice is motivated by personal convenience, not business necessity, and his expenses would not be deductible under the Flowers rule.

IV

An "all or nothing" interpretation of the traveling expense deduction makes for inconsistencies in the tax structure and inequities among taxpayers. When a taxpayer is required to travel in the pursuit of a business, the costs of transportation are directly attributable to the business and fall within the general scope of Section 23 (a)(1)(A). Lodging and meals, on the other hand, are personal in nature and therefore under the general rule of Section 24 (a)(1) should not be deductible unless the taxpayer is required by business necessity to increase or duplicate these expenses. Business trips will ordinarily require the taxpayer with an established residence to duplicate his lodging, and a full de-

53 I.T. 3842, 1947 Cum. Bull. 11. Cf. Hicks v. Comm'r, 9 T.C.M. 1088, 1090 (1950), where the Tax Court stated: "Upon a showing that travel... was for a business purpose, we believe expenses incurred on those occasions should be treated no differently than travel to other cities away from his principal place of business, although it was his home." It is not certain whether deductions for living expenses at the minor place of business and residence, as well as transportation costs, were being sought by the taxpayer.

52 See text following note 33 supra.
duction for these expenditures seems justified. The expense of meals, however, is rarely duplicated, and consistency at least would seem to justify deduction only of the increment of expense over and above what the taxpayer would ordinarily pay for meals at his established residence. When the traveling taxpayer has no permanent residence, his deductions, if any, for both lodgings and meals should be limited to amounts in excess of what he would hypothetically pay at a permanent residence. The administrative difficulties of determining this increment hardly justify the discriminatory effect of a full deduction of living expenses in any of these situations. It is submitted that a sounder legislative solution would be to allow deduction of an arbitrary percentage of living expenses incurred while traveling on business.54

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ESTOPPEL, THIRD PARTY PRACTICE, AND INSURER'S DEFENSES

Liability insurance contracts commonly contain a provision obligating the insurer to "defend in the name and on behalf of the assured any claim or suit, whether groundless or not, covered by this policy and brought against the assured." Valuable to the insurer as a protection against an indifferent defense or even a failure to defend on the part of the assured, this "defense" clause also benefits the assured by providing him with expert counsel. Difficulties arise when an injured party brings an action against the assured and subsequent investigation by the insurer reveals a breach of condition or an essential fact tend-

54 The drafters of the American Law Institute Tax statute apparently did not deem this matter sufficiently important to merit statutory modification. The pertinent section of the proposed statute provides: "Expenses of travel, including the entire cost of meals and lodging, in carrying on any gainful activity shall not be treated as personal, family, or living expenses. The term travel as used herein does not include ordinary transit of the taxpayer between his place of abode, permanent or temporary, and his nearest regular place of business." Federal Income Tax Statute § 151 (a)(1)(B)(ii) (tent. draft, 1951). The drafters give the following explanation for the proposed change: "To expenses of travel the terms 'away' and 'home' in section 151 (a)(1)(A) have been highly troublesome and are eliminated in this provision. The Bureau has taken the attitude that a taxpayer is not 'away' unless he stays at least overnight. This view was rejected by the Tax Court in Kenneth v. Waters, 12 T.C. 414 (1949), and no such requirement is adopted in this draft. Cases concerning the meaning of 'home' tend to make it mean 'principal place of business.' The suggested wording drops the term 'home' and adheres to the essential principle that an expense of travel, in order to be deductible, must be incurred in the pursuit of business. . . . In addition, the last sentence of subparagraph (ii), somewhat liberalizing present rules, specifically covers the troublesome situation where a taxpayer has more than one place of business. The decision of the majority of the Tax Court in Joseph H. Sherman . . . is substantially in harmony with the proposed provision, although some suggestions of the case as to the characterization of 'home' are divergent." Ibid., at 208. The Model Code would evidently allow the taxpayer who spends ten months at a city in the pursuit of a business to deduct all his living expenses while living there even if he only spends two months at another place of business where he has an established residence. This result follows because the living expenses in New York are incurred "in carrying on . . . gainful activity."

1 See, e.g., Oehme v. Johnson, 181 Minn. 138, 140, 231 N.W. 817 (1930).