'Metropolitan Area' and 'Away From Home'

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Boilermaker Corey Wheir lived in Wisconsin Rapids, Wis. A member of the boilermakers union, he worked at various manufacturing plants and paper mills throughout the state at job assignments he received from the union. When a boilermaker's name came to the top of the "ladder" maintained by the union, that boilermaker was assigned to the next job that came in and was required to accept the assignment. When a boilermaker finished one job, the union was notified and his name went back onto the ladder –- at the bottom. Mr. Wheir's jobs were temporary, involving repair, maintenance, construction, or rehabilitation of nuclear, gas turbine, and coal-fired plants. Some jobs lasted a few hours, some a few days, some several weeks, and a few lasted months.

Failure to Live in a Metropolitan Area

In Corey L. Wheir v. Commissioner, T.C. Summ. Op., Doc 2004-17449, 2004 TNT 169-11, one of the questions was when, if ever, Mr. Wheir could deduct his expenses in traveling to and occasionally staying overnight at various job sites. Most of the time, because Wisconsin Rapids was practically in the geographical center of Wisconsin, he could return home at night. The most remote location he went to was Kakuna, which was about 115 miles away. Sometimes, though, especially after 10-hour shifts, he would stay overnight at a local motel. He received no reimbursement for his transportation, meal, or room expenses on any of those jobs.

On his tax returns for 1999, 2000, and 2001, Mr. Wheir claimed unreimbursed employee expense deductions for most of those travel expenses. He claimed no deduction for expenses incurred on any job assignments that were within 35 miles of Wisconsin Rapids. The IRS disallowed all of the amounts claimed. Those were commuting expenses, contended the IRS, and thus nondeductible.

Tax Court Special Trial Judge D. Irwin Couvillion focused his attention on applying Rev. Rul. 99-7, 1999-1 C.B. 361, Doc 1999-2302, 1999 TNT 11-23, to Mr. Wheir's facts. The ruling held, consistent with rulings going back to Rev. Rul. 190, 1953-2 C.B. 303, that "a taxpayer may deduct daily transportation expenses incurred in going between the taxpayer's residence and a TEMPORARY work location OUTSIDE the metropolitan area where the taxpayer lives and normally works." There was no dispute that all of Mr. Wheir's work assignments were temporary. Nevertheless, the IRS took the position that:

> the petitioner [Mr. Wheir] does not live in a Metropolitan area as defined by the United States Census Bureau. Therefore, the primary issue of concern is where the petitioner normally works. The government's primary position is that the whole State of Wisconsin would be deemed to be the petitioner's normal work area (commuting area) and any job site outside Wisconsin would be deemed non-commuting.

Dealing With an Undefined Phrase

Judge Couvillion disagreed. The phrase "metropolitan area" is not defined in Rev. Rul. 99-7 or, for that matter, in any other IRS publication. According to the census bureau, the term "metropolitan area" refers collectively to metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas, and primary metropolitan

statistical areas. The state of Wisconsin apparently contained 13 MSAs in 2003, although Wisconsin Rapids did not fall into any one of them. The 35-mile radius from his home, as used by Mr. Wheir, encompassed at least 3,850 square miles. MSAs close to Wisconsin Rapids included Wausau, directly north of Wisconsin Rapids, and Eau Claire, somewhat to the northwest. The Wausau MSA had a land mass of 1545.1 square miles and the Eau Claire MSA had a land mass of 1,648.2 square miles. To the northeast, Green Bay had a land mass of 528.7 square miles in its MSA. (By contrast, the Phoenix-Mesa (Arizona) MSA contains 14,574.0 square miles and the Las Vegas (Nevada and Arizona) MSA contains 39,370.3.) Without referring to those various definitions and MSA areas, Judge Couvillion observed that the IRS interpretation of metropolitan area as, in effect, meaning the whole state for those communities not included in a census bureau metropolitan area:

> could lead to unfair and illogical results. For example, a boilermaker who happens to live in a Bureau of the Census-designated metropolitan area would be allowed a deduction for transportation expenses to any job site outside that metropolitan area; yet, a taxpayer such as petitioner who does not live in an area so designated would not be entitled to deduct the same expenses. Such a position does not establish a level playing field for taxpayers.

Judge Couvillion then concluded that he would use "an ordinary common sense" definition for metropolitan area, and one that he felt consistent with the usage of metropolitan area in Rev. Rul. 190 back in 1953. From the dictionary, he took "metropolitan" as "relating to, or constituting, a region including a city and the densely populated surrounding areas that are socially and economically integrated with it." Mr. Wheir had determined that he was "out of town" when he was more than 35 miles from Wisconsin Rapids, and Judge Couvillion accepted that as reasonable in the absence of any evidence from the IRS to suggest that it was not. In particular, he rejected the IRS's alternative suggestion that Mr. Wheir's normal work area consisted of everything within an 80-mile radius of his home -– which would embrace an area of 20,200 square miles that was larger than any MSA in the state of Wisconsin.

"Away From Home" a Catch-22

"Away from home" travel, as distinguished from commuting, has always been a headache to both tax administrators and tax practitioners. There is no fair answer. From one part of the Phoenix metropolitan area to another location within that area can be 50 or 60 miles, as is also true of many other large cities and their surrounding populated areas that are "socially and economically integrated with it." Even Judge Couvillion would not settle for a radius of 35 miles of home as being reasonable for someone living in such an area, even though that might work out quite well for Green Bay, Wausau, or Eau Claire as well as Wisconsin Rapids. We can sympathize with the IRS's desire to have a simple solution, but clearly the definition of metropolitan area the IRS tried to apply to Mr. Wheir was unacceptable.

In Wheir, the IRS was tripped up by the ambiguity of its own ruling language. Ruling language in connection with transportation expense was also an issue twelve years ago in Charles Walker, 101 T.C. 537, 93 TNT 253-2, Doc 93-12789 (1993), which involved a self-employed professional tree cutter who worked in the Black Hills National Forest. In Walker, Tax Court Judge Robert P. Ruwe agreed with the IRS that the taxpayer "has not established that his residence was his principal place of business." If it were only for the case law, said Judge Ruwe, "It would therefore follow that his daily expenses for transportation from his residence to his first job site and from his last job site of the day to his residence are not deductible." That is because Judge Ruwe

accepted "for purposes of this case" the IRS position that the entire Black Hills National Forest, in which Walker both lived and performed all of his work, should be treated as a "metropolitan area" within the meaning of Rev. Rul. 90-23, 1990-1 C.B. 28.

The Importance of IRS Rulings

But Judge Ruwe did not believe that the case law or the metropolitan area determination was the end of the discussion. He agreed with the IRS that Rev. Rul. 90-23 set the standard for transportation expenses at that time. That ruling allowed a section 162(a) deduction for transportation expenses incurred in traveling between the taxpayer's residence and temporary work locations in the same metropolitan area only if the taxpayer had at least one "regular place of business." Even though Walker's home did not meet the then standard for being a principal place of business, Judge Ruwe concluded that it qualified as a regular place of business. He therefore allowed Walker to deduct his transportation expenses.

Instead of withdrawing Rev. Rul. 90-23 in the wake of Walker, the IRS "amplified and clarified" it in Rev. Rul. 94-47, 1994-29, 1994-2 C.B. 18, Doc 94-6184, 94 TNT 128-6. In that ruling the IRS also explained that it disagreed with the Tax Court decision in Walker and would not follow it. The essence of the IRS's position in Rev. Rul. 94-47 was that there are only two situations in which a taxpayer can get a transportation expense deduction for expenses incurred in traveling between a residence and a temporary place of business in the same metropolitan area:

> (1) "where the taxpayer also has a regular place of business that is not located at the taxpayer's residence," or
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> (2) where the taxpayer's residence is his or her principal place of business.

The "gimme" lay in the definition of principal place of business as the place where the taxpayer delivered the goods or services involved in his business to the user or customer. Thus, a self-employed plumbing contractor who maintained an office/shop away from home could deduct transportation expenses in going from home to a customer's location. However, if his office/shop was in his residence, that same trip would be deductible only if that residence was his principal place of business. The ruling said that the plumber's principal place of business was where he did his work and therefore he could not deduct his transportation expenses from his home to his first customer's location each day nor from his last customer's location back to his home. Not only the plumber was affected, of course. Hundreds of thousands, perhaps millions, of small service businesses have no regular place of business other than the owner's home and render their service in the offices and homes of their customers and clients.

Congress to the Rescue

There was enough of an outcry for Congress to come to the rescue. Because the definition that the IRS was using to justify its Rev. Rul. 90-23 approach was based on the definition in section 280A(c)(1) of "principal place of business for any trade or business of the taxpayer" as that had been interpreted by the Supreme Court in Commissioner v. Soliman, 113 S. Ct. 701, Doc 93-668, 93 TNT 9-1 (1993), the straightforward solution was to modify that definition. The lawmakers did so by adding a sentence:

> The term "principal place of business" includes a place of business which is used by the taxpayer for the administrative or

> management activities of any trade or business of the taxpayer if there is no other fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such business.

Documentation

Even when the expenses involved are of a deductible nature, failing to maintain adequate substantiation can still lead to a complete disallowance. Therefore, in John A. Walz, Jr. v. Commissioner, T. C. Summ. Op. 2005-1, Doc 2005-313, 2005 TNT 2-17, Mr. Walz, an internationally recognized cellist of exceptional ability, produced a tour in 2000 with Ensemble Con Brio, a German chamber orchestra. He toured with the ensemble, served as soloist, and recorded a performance with the ensemble at the end of the tour. His execution on the cello may have been perfect, but his recordkeeping left something to be desired.

On his income tax return for 2000, Mr. Walz claimed $10,135 of deductions for travel expenses he incurred from the tour. That included the rental of vans to transport the groups and payment of airline fare for them to reach some destinations. Tax Court Special Trial Judge John J. Pajak explained why he could not allow the deduction:

> Unfortunately for petitioner, Congress has passed section 274 with respect to traveling expenses (including meals and lodging while away from home). . . . Section 274(d) imposes stringent substantiation requirements for the deduction of these expenses. Petitioner did not meet the strict substantiation rules of section 274. He is not entitled to a deduction for these expenses.

However, all that Mr. Walz suffered was a disallowance of expenses and the resulting income tax deficiency. A recent technical advice memorandum, TAM 200435020, Doc 2004-17298, 2004 TNT 168-20, underscores that trustees, officers, and employees of tax-exempt organizations, and any others who would be classified as disqualified persons under section 4958(f)(1) and who are reimbursed for travel expenses that may not meet the standards for deductibility, might also face 25 percent excise taxes under section 4958 because those reimbursements would constitute excess benefit transactions.[1] Said the TAM:

> Any reimbursement of expenses by an exempt organization to an employee, or direct expenditures of organization funds by the employee, are automatic excess benefits to the extent that they do not satisfy the requirements of section 1.62-2 (per section 53.4958-4(a)(4)(ii)), or section 162 and (to the extent relevant) 274 of the Code and the regulations thereunder, unless they are substantiated as compensation pursuant to section 53.4958-4(c)(3) of the regulations.

The TAM dealt with an organization founded by an individual that was determined initially to be a church and then had its status modified to that of a private foundation in years after those involved in the TAM. The founder is the president and director, his wife is secretary-treasurer and a director, and their sons are directors. Illustrative of the types of transactions involved were five organizational credit cards used by the founder for such charges as business meals and gasoline. The TAM advised that the founder had the burden of proving that his

[1] Tax Analysts reported March 4, 2005, at Doc 2005-4411, that IRS shortly will revise the Internal Revenue Manual to delete a requirement that IRS agents investigating potential excess benefit transactions submit these issues for formal technical advice. We infer from this that excess benefit transactions are apt to get even more IRS field examination attention.

"residence was also his principal place of business," because most of the gasoline expense was apparently incurred in what otherwise would be viewed as commuting. Because he had not done that, said the TAM, "the gasoline charges as listed above constitute excess benefits."

Away From Home When There Is No Home

While the founder in the TAM had the problem of proving that his home was also his principal place of business, some taxpayers who can document the business purpose and amount of their travel expenses have a problem even proving that they have a home to be away from. An example of such a taxpayer was William J. McNeill, who owned and operated a long-haul, over-the-road truck. McNeill claimed Schedule C expenses, respectively, of $8,006 and $5,799 for travel expenses and $6,480 and $5,760 for meal expenses for the 360 and 345 days he was on the road in 1998 and 1999. While not disputing that McNeill spent the money, the IRS questioned whether he could have expenses "while away from home" when he was almost always on the road and really had no home from which to be away.

In William J. McNeill v. Commissioner, T.C. Memo. 2003-65, Doc 2003-6033, 2003 TNT 45-8, the IRS had disallowed those claimed expenses and proposed deficiencies of $4,065 and $3,389. McNeill had spent five days at a house in Green Bay in 1998 owned by his partner. His only expense related to that stay was his telephone bill. That same year, he bought a mobile home on a contract for deed. However, he paid no utilities or maintenance on it in 1998 and stopped there for only a few hours at a time while reloading his truck. He spent 20 days at the mobile home in 1999. Tax Court Judge Michael B. Thornton found it significant that "apart from the $1,000 annual payments on the mobile home, he had no substantial continuing living expenses at either the Green Bay house or the mobile home."

Judge Thornton concluded that McNeill thus "had no principal place of business, nor did he incur substantial living expenses at a personal residence. . . . Consequently, he had no tax home within the meaning of section 162(a)(2) and is not entitled to the claimed deductions for traveling expenses (including meals expenses)."

Conclusion

We started with the question, Where is home? The context, of course, was the deductibility of expenses when away from home. We were reminded that revenue rulings can be used against the IRS, as in Walker, but are often disregarded by the courts, especially the Tax Court, when they do not seem to be reasonable under the circumstances. They are also subject to interpretation by the courts and often the court will find it disagrees with the IRS interpretation of a ruling, as Judge Couvillion did with the IRS interpretation of "metropolitan area" in Wheir.

Home is a metropolitan area when you are an employee traveling to a temporary job location on business. If home is your principal place of business and you are self-employed, you can deduct the travel expenses whenever you travel on business, whether within or without your metropolitan area. Of course, what is an appropriate metropolitan area may well be open to debate. In Wheir, the IRS considered the taxpayer's entire state to be such an area inasmuch as he lived in a city that the census bureau did not recognize as being part of a metropolitan area. That seems to be rank discrimination, of course, penalizing those who live in rural America as against dwellers in more populous cities. Perhaps the IRS reasoned that the psychic income from a more rural lifestyle needed to be subjected to income tax. (Of course, the metropolitan area approach also discriminates against those who live and

work in extremely large metropolitan areas, such as Phoenix and Las Vegas, compared with smaller areas like Green Bay or Wausau.)

The tax practitioner faced with a client who wants to maximize deductions for travel while away from home will resolve the borderline questions based on the client's risk tolerance as well as the practitioner's own bias toward pushing the envelope or taking more conservative positions. The biggest practical problems usually involve the section 274 substantiation. Clients do not really believe even yet that their deductions may disappear if they are not substantiated. The tax practitioner needs to ask sufficient questions to ascertain that the client has adequate substantiation, although practitioners are not required to actually examine or audit those records.

Again, practitioners differ as to their practices, with the same practitioner even dealing differently with different clients. Some practitioners want to see what those records look like even if that is going beyond the bare minimum required by the standards. They reason that clients come to them not only for assurance against penalties but also to avoid deficiencies. Without documentation, they are definitely risking both.