

October 1961

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Repository Citation

Rexford R. Cherryman, *Federal Income Taxation: Meals and Lodging Furnished for the Convenience of the Employer - Two Sequels to the Boykin Case*, 3 Wm. & Mary L. Rev. 166 (1961), <https://scholarship.law.wm.edu/wmlr/vol3/iss1/9>

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FEDERAL INCOME TAXATION

*Meals and Lodging Furnished for the Convenience of the Employer
Two Sequels to the Boykin¹ Case*

In *Rodney E. Wolf*,² taxpayer and his wife were both faculty members at a boys' school where they were required to live. The cost of their lodgings and meals was deducted from their salaries. In filing their joint tax return for 1954, taxpayers excluded \$1000,³ which comprised these costs, from their \$5450 salary. The Commissioner disallowed this exclusion, and as a result determined an income tax deficiency of \$185. The taxpayers took their case to the Tax Court, and on June 30, 1958, that court handed down a memorandum opinion sustaining the Commissioner's action. In their briefs, both parties agreed that the *Boykin* case was in point, but the taxpayers simply argued that the Tax Court's decision with respect to *Boykin* should not be followed. The *Boykin* case at that time was awaiting a review by the U. S. Court of Appeals for the Eighth Circuit.

Mr. and Mrs. Wolf appealed their case on July 3, 1958 to the U. S. Court of Appeals for the Fourth Circuit, and while their case was awaiting review, the *Boykin* reversal was handed down by the Eighth Circuit Court in October. In May, 1959, the Internal Revenue Service issued a ruling⁴ which stated that the *Boykin* case as finally decided by the Eighth Circuit Court would be followed for tax years subsequent to 1954 and that "steps will be taken to conform the Treasury Regulations and outstanding rulings to the *Boykin* decision." When the Wolfs'

¹In October 1958, the U.S. Court of Appeals for the Eighth Circuit, in *Boykin v. Commissioner* (260 F. 2d 249) reversed the Tax Court by holding that a physician required to occupy quarters at a Veterans' Hospital could exclude their rental value which had been charged against his salary. The Tax Court (29 T.C. 813), in disallowing the exclusion, had relied upon Treas. Reg. § 1.119-1(c)(2) (1956), which states that to qualify for the exclusion the meals and lodging must be "furnished in kind, without charge or cost to the employee." (Emphasis supplied).

²27 P-H Tax Ct. Rep. & Mem. Dec. 58-129 (1958).

³Money amounts throughout this article have been rounded off.

⁴Rev. Rul. 59-307, 1959-2 Cum. Bull. 48 (TIR No. 158 of May 21, 1959).

appeal came up on the docket of the Fourth Circuit Court in June, 1959, the Commissioner had conceded that the Tax Court's finding should not be upheld, and accordingly the Fourth Circuit Court summarily reversed on stipulation of the parties and without any discussion of the issues.⁵

The Internal Revenue Service was quickly given an opportunity to follow the *Boykin* case as it had indicated, for on May 29, 1959, the case of *William I. Olkjer*⁶ came before the Tax Court. In this case, the taxpayer was a construction engineer in Thule, Greenland where, because of the remoteness of the jobsite, the only living facilities available for him were furnished by his employer, the United States Army. Pursuant to this contract with the Army, taxpayer paid his employer a fixed sum of \$5.75 a day from his salary for "meals, lodging, laundry, drycleaning, social services, hospitalization, medical expenses, and temporary dental care." From his 1954 salary of \$20,600 he excluded \$1770, and from his 1955 salary of \$5170 he excluded \$437, these amounts comprising the \$5.75 per day payments which he claimed were excludable under the provisions of Section 119 of the Internal Revenue Code of 1954. The Commissioner in his brief stated specifically that he did not urge the views he had expressed initially in the *Boykin* and *Wolf* cases, which he mentioned by name. In effect he conceded that, despite the Treasury Regulation to the contrary,⁷ the mere fact that an employer charged for meals and lodging furnished an employee should not of itself preclude the employee from excluding such meals and lodging expenses if they could otherwise qualify under Section 119.⁸

⁵*Wolf v. Commissioner*, 264 F. 2d 82 (4 Cir.; 1959).

632 T.C. 464 (1959).

⁷Treas. Reg. § 1.119-1(c)(2) (1956).

⁸The Commissioner of Internal Revenue advanced as the principal issue in the case whether the meals and lodging were "furnished primarily for the convenience of the employer (and thus excludable) or whether they were primarily for the convenience of the employee (and therefore taxable)." The Commissioner contended that employee's convenience outweighed employer's. The Tax Court found that the taxpayer had sustained his burden of showing that he had no choice but to accept the facilities proffered by the employer at the jobsite, in view of its remote locale and notwithstanding that he was not on twenty-four hours call and that the facilities furnished were of convenience to him as well as to his employer.

From this chain of events, it is apparent that the issue is closed. Whether an employee must reimburse his employer for meals and lodging will no longer have a bearing on their excludability under Section 119. Henceforth, they will be excluded if they otherwise meet the tests of that section. It is unlikely that any U. S. Courts of Appeal other than those of the Fourth and Eighth Circuits will ever have an opportunity to consider cases focusing on this issue. The Internal Revenue Service has conceded the point, has issued a ruling on it, and the die has been cast.

Logically the new policy makes sense, for it puts taxpayers who are obliged to pay their employers for their quarters on a parity with those taxpayers who are furnished quarters without charge or who are given a special monetary "allowance" for quarters. For example, consider a taxpayer in the first category who receives a salary of \$1250 monthly of which \$250 must be paid back to his employer for his quarters. This is the *Boykin* situation. Compare him with a taxpayer in the second category who receives \$1000 plus his quarters free, and a third taxpayer who receives a \$1000 salary plus a \$250 allowance which he must return to the employer. There is no reason why all three taxpayers should not pay the same tax, since their take home pay, as it were, is the same in each case. The *Boykin* case, as well as the *Wolf* case which followed it, were ultimately decided in conformity with this reasoning.

Although the *Boykin*, *Wolf*, and *Olkjer* cases ostensibly clarify another aspect of the meals and lodging exclusion under Section 119, they have actually served merely to make one more inroad into a phase of the income tax system which has undergone constant and inexorable erosion since 1919, when seamen were first allowed to exclude the value of their meals and berthing furnished them aboard ship.⁹ The seamen were quickly followed by hospital employees,¹⁰ military officers,¹¹ hotel em-

⁹1 Cum. Bull. 71 (1919).

¹⁰O.D. 915, 4 Cum. Bull. 85 (1921).

¹¹Clifford Jones, 1 U.S.T.C. ¶ 129, 60 Ct. Cls. 552 (1925).

ployees,¹² state troopers,¹³ resident faculty members,¹⁴ and countless others, so that by 1954 the pathway was so thoroughly trod that the exclusions were made a part of the 1954 Code at Section 119.¹⁵ Clergymen were specifically given preferred treatment by the Code,¹⁶ and for a time the Code gave policemen special tax benefits with respect to allowances for food while on duty.¹⁷ The concept that meals and lodging are personal living expenses and therefore taxable has been all but abandoned in those situations where an employee is deprived by his employer of his choice of where to procure them.

As long as a special exclusion for meals and lodging exists in its current form, the miasma of conflicting rulings and cases attempting to formulate a consistent policy on the subject will continue to frustrate both the taxpayer and the government. No clear policy can ever be formulated which rests on a patently false and illogical premise. No silver thread of consistency can ever be found, for under such circumstances it simply cannot exist.¹⁸

¹²*Benaglia v. U.S.*, 97 F. 2d 996 (9 Cir.; 1938).

¹³*Hyslope*, 21 T.C. 131 (1953); *Saunders*, 21 T.C. 630, 21 F. 2d 768 (3 Cir.; 1954).

¹⁴Rev. Rul. 59-409, 1959-2 Cum. Bull. 48.

¹⁵For a thorough and well documented development of the history of the convenience of the employer rule, see Gutkin and Beck, *Some Problems in "Convenience of the Employer,"* 36 TAXES 153 (March 1958).

¹⁶Section 107, Int. Rev. Code of 1954, § 107.

¹⁷*Id.*, § 120, which was repealed on September 2, 1958 by § 3(a) of P.L. 85-866 (72 Stat. 1607).

¹⁸The difficulty in this area is compounded when one seeks to determine what policy governs how the "family" fits into the meals and lodging exclusion. This problem is one of considerable proportion and continues to confound the taxpayer as well as the Internal Revenue Service. For example, Rev. Rul. 59-409, (1959-2 Cum. Bull. 48) required, in effect, that a qualifying teacher living on campus prorate his meals and lodging expenses between himself and his family and to exclude only the value of meals and lodging appertaining to himself, a determination obviously difficult even of rough estimation much less a fairly accurate computation. The impracticality of such a ruling was evidently realized rather suddenly, for some hasty patchwork was performed by the Internal Revenue Service in its extremely brief Rev. Rul. 60-348, (1960 Int. Rev. Bull. No. 45, at 9) which, without attempting to define policy, merely withdrew Rev. Rul. 59-409. This palliative action still leaves the Internal Revenue Service with the task of facing the problem squarely and providing a comprehensive solution. Just

No one would seriously argue that food and lodging do not constitute personal expenses, any more than one would contend that medical or child care expenses were not personal. No matter what one's occupation is or where it leads him, he will always be obliged to feed himself and provide a home. The Code¹⁹ clearly sets forth the policy for tax treatment of personal living or family expenses: the point of departure in dealing with all such expenses is that they are not deductible from income and hence taxable. Why the highly personal expenses of subsistence and lodging should be afforded special tax treatment simply because a taxpayer is limited in his choice of *where* to procure them defies logical analysis.²⁰ If we are to maintain consistency with the general doctrine that normal personal expenses are not deductible, then we must radically revamp the provisions of Section 119.

No test of "compensation," "convenience of employer," "condition of employment," or restriction as to where one must dwell or eat should ever be applied to determine the non-taxability of income received to cover normal personal living expenses. An economic benefit always accrues to anyone who receives meals or lodging from his employer without charge or at a reduced cost. That economic benefit is tantamount to income, and it should be included as such on the employee's tax return whether it is labeled "compensation" or not. Whether such income is received in kind or as a cash allowance should make no difference either, for it is nonetheless income. The proper test to determine the excludability of meals and lodging expense should be: Is the taxpayer deprived of a choice as to *how much* of his total income he can spend to acquire these necessities? Where the answer is yes and he has been required to expend excessive sums in proportion

what esoteric distinction the Service intends between the expression *withdrawn* and terms such as *rescinded* and *revoked*, which are frequently found in its rulings, has never been made absolutely clear, but the more timorous term *withdrawn* would seem to connote something less than inciseness in attempting to formulate policy. Add Section 107 of the Code to the picture and hope of discovering a silver thread becomes even more remote, for in Section 107, although the term *family* is not used, it is apparently settled that the term *clergyman* includes his family for purposes of allowing an income exclusion for the value of his parsonage.

¹⁹Int. Rev. Code of 1954, §§ 261, 262.

²⁰See, e.g., Frueauff, 30 B.T.A. 449 (1934); Chandler, 41 B.T.A. 165 (1940); and Reynard, 30 B.T.A. 451 (1934).

to his income, then and only then should he be provided with tax relief.²¹

This concept is not new. Congress has recognized a need for special legislation in other areas where excessive personal expenses are involuntarily incurred, and special dispensation in the forms of tax credits, exclusions, and deductions, has been granted in the tax law as to those excessive amounts. The most obvious instances are the child care²² and the medical expense²³ deductions. In both of these areas formulas have been evolved (and embellished, as inequities have become manifest through their application) which are based on the quantum of income and which recognize some amount on which it is the taxpayer's duty to pay taxes. Where application of these formulas reveals that these expenses exceed the normal amount which a taxpayer should be expected to incur, then the tax benefits come into play to relieve his burden. These formulas are concededly artificial and at times even arbitrary, and in their application, some taxpayers fare better than others, but the formulas are fundamentally sound, for they recognize the basic concept of the taxability of income received for normal personal expenses. Why should not this concept be applied to meals and lodging?²⁴

In order to derive such a formula for meals and lodging, it is necessary to recognize the axiom that although expenses for

²¹*Olin O. Ellis*, 6 T.C. 138 (1946) recognized the logic of distinguishing normal and excessive lodging expenses, but in applying their theory, the court came up with an inversion of the theory proposed here. In *Ellis*, employee hotel manager moved to more expensive accommodations than those necessary for him to occupy for the convenience of his employer, as determined by the facts of the case. The portion of rental attributed to the employer's convenience was allowed to be excluded from employee's income, while the excess was held taxable.

²²Int. Rev. Code of 1954, § 214.

²³*Id.*, § 213.

²⁴Support for this general argument can be found in Harrington, *Viewpoints on Reforming the Federal Tax System* (TAX POLICY, July-August, 1960, p. 13). This article is a summary of the hearings on the general revision of the federal tax system conducted by the House Ways and Means Committee in 1958-59. One of the panelists recommended that the exclusions of the value of meals and lodging for the convenience of the employer should be considered for amendment. It was stated in the hearings that this exclusion is a windfall for many and permits many employees to live in a style to which they would otherwise be unaccustomed.

meals and lodging are not directly proportional to income, they are to a substantial extent a mathematical function of income; that is, as income increases, less is spent, proportionately, for the basic necessities of meals and lodging. But the taxpayer's income always has a bearing on how much he spends, and where his expenditures are voluntary, his income is the chief controlling factor. It would seem propitious, then, bearing in mind that normal personal expenses should not receive special tax treatment, to replace the present provisions of Section 119 with a formula which would require every taxpayer, no matter what his income stratum or his vocation, to include as income the value of all meals and lodging received for which he does not have to pay. He should further be required to pay a tax on what he would normally be expected to spend, in the light of his financial circumstances, for such necessities. Where his vocation requires him to consume food or to shelter himself at an expense in excess of this norm, then *as to that excess* the taxpayer should be granted relief, either in the form of an exclusion or a deduction. Only at this point should the tests of employer's convenience or business necessity enter, and then only to determine the employee's lack of choice in the matter.

If such an approach were adopted in redrafting those parts of the Code involving these areas, the turmoil and uncertainty over treatment of meals and lodging in the tax system would be virtually eliminated. A firm structure of tax regulations and rulings could be built on the basis of what would be a fundamentally sound and realistic personal expense policy. Furthermore, the new doctrine would extend to meals and lodging incident to business travel, and would simplify several problem areas in that field.

True, taxes would be higher for some, but if the government were to become embarrassed by the increased revenue received as a result, it should in no event tamper with the personal expense doctrine which is so fundamental to the federal tax system. There are a multiplicity of other devices available to alleviate the situation. If the clergyman is palpably discomfited, and society wishes to favor him, Congress can do as it did with World War II servicemen, and simply exempt an additional part of his income from taxation. If military officers' quarters and subsistence allowances, which are presently tax-free, are merged into his

taxable basic pay, and his take home pay is thereby lowered, the government need merely raise his salary. "Allowances" for meals and lodging would be ultimately eliminated from employees' compensation (and bookkeeping would be considerably simplified) for, being taxable, no advantage would be gained by so labeling them.

To summarize: Practically speaking, no human being can be absolved of the necessity of providing himself with sustenance and a shelter. These activities consume a considerable amount of his time, effort, and, in a civilized society, money. When he spends money, his expenditures are essentially and inescapably personal. When he receives meals and lodging free of charge, he is economically benefited, and he therefore receives income, which should be reported. The bare fact that a taxpayer's work deprives him of a choice as to *where* he can obtain these basic necessities should never be determinative of whether he can obtain tax relief with respect to them. No matter where he obtains them or how, obtain them he must. It is only when he must expend amounts for meals and lodging in excess of what would normally be expected of him in the light of his income that the government should step in and afford him tax relief. The federal income tax structure should be altered to reflect the logic of this proposition.

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