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Federal Income Tax - Residence Located Apart From Premises Where Employee Performed Duties Is Not "On The Business Premises of the Employer" As Required By 1954 Int. Rev. Code Section 119; Rental Value of Residence and Value of Food Supplied By Employer Not Excludable From Gross Income. Commissioner v. Anderson (6th Cir. 1966)

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RECENT CASES

FEDERAL INCOME TAX—RESIDENCE LOCATED APART FROM PREMISES WHERE EMPLOYEE PERFORMED DUTIES IS NOT "ON THE BUSINESS PREMISES OF THE EMPLOYER" AS REQUIRED BY 1954 INT. REV. CODE SECTION 119; RENTAL VALUE OF RESIDENCE AND VALUE OF FOOD SUPPLIED BY EMPLOYER NOT EXCLUDABLE FROM GROSS INCOME. *Commissioner v. Anderson* (6th Cir. 1966).

Charles Anderson was employed by the Lincoln Lodge Corporation to manage a motel near Columbus, Ohio. When the motel opened for business, Mr. Anderson, his wife, and their three children occupied a two-room suite in the motel. A year later, Mr. Anderson complained to his employer about the overcrowded conditions and requested more adequate quarters. After considering the loss of revenue that would result if Mr. Anderson were permitted to occupy additional space within the motel, the Corporation decided that Anderson and his family should live off the premises.

Anderson's preference for a particular two-story house located several blocks from the motel was rejected by the Corporation because Anderson was required to be available twenty-four hours a day in order to supervise the operation of the motel. The Corporation considered constructing a residence on the motel property, but rejected the idea, since the land was too valuable for such use. Instead, Lincoln Lodge purchased a vacant lot two blocks from the motel and constructed a single-family residence upon it. This lot was the closest available property zoned for single-family residence. Anderson and his family resided in the house during the taxable years involved—1958, 1959 and 1960—without charge. In addition, the employer paid all utilities at the house, furnished laundry and dry cleaning services and furnished food valued at $300.00 per year.

The Sixth Circuit Court of Appeals, in reversing the Tax Court,[1] held that the value of the meals and the lodging[2] was not excludable from gross income because the meals and lodging were not furnished

[1] Charles N. Anderson, 42 T.C. 410 (1964) (house qualified as business premises when acquired to satisfy need for larger quarters; furthermore, motel revenues increased by renting space vacated by Anderson).

[2] The Tax Court found the value of the lodging to be $3,120.00 per year and the value of the food to be $300.00 per year. These findings were not disputed.

"on the business premises of the employer" as required by Section 119 of the Internal Revenue Code of 1954.[3] *Commissioner v. Anderson*, 371 F.2d 59 (6th Cir. 1966).

Section 119 provides that the taxpayer may exclude from gross income the value of any meals or lodging furnished him by his employer for the "convenience of the employer" only if the meals are furnished *on the business premises* of the employer; or, in the case of lodging, if the employee is required to accept such lodging *on the business premises* of the employer as a condition of his employment.[4] No issue was raised in the present case with respect to the conclusions of the Tax Court that the meals and lodging were furnished for the convenience of the employer, or that Anderson was required to accept the lodging as a condition of his employment.[5] However, the majority of the Sixth Circuit disagreed with the conclusion of the Tax Court that the house qualified as "business premises of the employer."

District Judge Wilson,[6] writing for the majority, concluded that the phrase "the business premises of the employer" means *either* a place where the employee performs a significant portion of his duties, or premises where the employer conducts a significant portion of his business.[7] Thus, in defining "business premises," the emphasis centers upon the place where duties of the employee are to be performed rather than upon the employer's ownership or control of the particular premises.[8] For support, the court pointed to the pertinent Treasury regulation, which provides: "For purposes of this section [meals and lodging], the term 'business premises of the employer' generally means the place of employment of the employee. . . ."[9]

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[3] INT. REV. CODE OF 1954, § 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

[4] *See generally* Wolfe, *Tax Treatment of Meals and Lodging*, 28 N.Y. CERT. PUB. ACCOUNTANT 344 (1958).

[5] Commissioner v. Anderson, 371 F.2d 59, 62 (6th Cir. 1966).

[6] Frank W. Wilson, District Judge, Eastern District of Tennessee, sitting by designation.

[7] 371 F.2d at 67.

[8] *Id.* at 64.

[9] Treas. Reg. § 1.119-1 (1956). "While the Court is not bound by Treasury regulations where they are inconsistent with the statute which they seek to interpret and

The court then reviewed several other cases where the phrase "on the business premises of the employer" has been construed. *United States v. Barrett*[10] presented the question whether Mississippi highway patrolmen were entitled to exclude reimbursement by the state for meals purchased at various locations along the highway while on duty. The Fifth Circuit held that the value of the meals taken at restaurants along the highway was excludable, since the business of law enforcement was not confined to patrol headquarters, but rather, covered every road in the state.[11] The Eighth Circuit reached a similar result in *United States v. Morelan*,[12] concluding that restaurants near or adjacent to highways were on the business premises of the employer.[13]

Barrett and *Morelan* reflect a liberal interpretation of "business premises," for Judge Wilson emphasized that in both cases the court rejected the Commissioner's contention that "business premises" would be limited to premises owned or controlled by the employer.[14] The decisions are consistent with the *Anderson* view that the premises must be those upon which some portion of the employee's duties is performed.[15] Exactly what "duties" a highway patrolman performs in a restaurant "near" the highway was not mentioned by the *Anderson* court.[16] The court turned directly to the case in which it felt the rule was stated, *United States Junior Chamber of Commerce v. United States*.[17] There, the issue was the excludability of the rental value of a

implement, they must be sustained unless unreasonable or plainly inconsistent with the statute, and may, where long continued without substantial change, be deemed to have received Congressional approval and have the effect of law. Morrison v. United States, 355 F.2d 218 (C.A. 6 1966)." 371 F.2d at 64-65.

10 321 F.2d 911 (5th Cir. 1963).

11 "The Commissioner takes too narrow a view of what constitutes the 'business premises' of the Mississippi Highway Patrol. . . . [I]t is unrealistic to treat the employer's place of business as limited to state patrol headquarters. This criterion . . . is not decisive against the excludability of the sums here in question." *Id.* at 912.

12 356 F.2d 199 (8th Cir. 1966).

13 "It is conceivable . . . to call all state land the business premises of the state since the state can regulate, tax and exercise a great deal of control over the land. Such is not true of a private employer, whose business premises are arguably limited to that which can be controlled and regulated by him." *Id.* at 203.

14 The fact that both courts rejected the Commissioner's contention does not seem authority for the proposition that ownership by the employer of the property in question is immaterial for purposes of determining whether that property is "business premises" under Section 119. *Barrett* and *Morelan* merely say that the fact that the employer has no property interest in the premises will not preclude it from qualifying as business premises.

15 371 F.2d at 65.

16 While taking meals on duty it was standard procedure to leave the patrol car next to the road and give the dispatcher the phone number of the restaurant. United States v. Morelan, 356 F.2d 199, 201 (8th Cir. 1966).

17 334 F.2d 660 (Ct. Cl., 1964).

house provided for the national president of the organization. The Court of Claims found that a portion of the president's duties were performed at the home, and then declared the rule: "We think that the business premises of § 119 means premises of the employer on which the duties of the employee are to be performed."[18]

The *Anderson* court deemed *Dole v. Commissioner*[19] "even more pertinent" to its decision. There the majority of the Tax Court construed the phrase "on the business premises" to mean either: (1) Living quarters that constitute an integral part of the business property or (2) premises upon which the company carries on some of its business activities.[20] Judge Raum, concurring in *Dole*, disapproved of the Tax Court decision in *Anderson* in these words:

> The matter probably would never have reached this present state of apparent confusion and disagreement among the members of this Court were it not for the unreviewed decision in *Charles N. Anderson* . . . . I think that *Anderson is distinguishable* for the reason articulated in the majority opinion. But I also think that it is wrong and that it should be overruled to put an end to the confusion that it has created (emphasis added).[21]

The Court of Appeals, affirming *Dole* in a per curiam opinion,[22] did so on the basis of Judge Raum's opinion. The fact that Judge Raum's comments regarding *Anderson* were mere dicta did not prevent the court in the instant case from labelling *Dole* "even more pertinent."[23]

Judge McAllister, dissenting to *Anderson*, felt that the construction of Section 119 advocated by the Commissioner was "based on an obsession with words; . . . narrow and extreme; and . . . unjustified by the purposes of the statute, and contrary to the intention of Congress,"[24] since Congress did not intend to put geographic bounds on the business premises of an employer.[25] According to a narrow construction of Section 119, patrolmen would not be consuming their meals "on" the business premises of the employer when dining at a

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18 *Id.* at 664-65.

19 351 F.2d 308 (1965), *affirming per curiam* 43 T.C. 697 (1965). Supervisory employees were directed to live in company-owned houses one mile and more from the mill where they worked. *Held:* The employees were not entitled to exclude rental value since living in particular houses was unnecessary to perform duties properly; and, the houses were not on business premises.

20 43 T.C. at 707.

21 *Id.* at 709.

22 351 F.2d 308 (1965).

23 371 F.2d at 65.

24 *Id.* at 77.

25 371 F.2d at 75, *citing* United States v. Morelan, 356 F.2d 199 (8th Cir. 1966).

private restaurant on private premises at a distance of a half a block from a highway. Yet, as the minority pointed out, both *Barrett* and *Morelan*, cited by the majority, decided directly contrary to such narrow construction.[26]

Applying the rule of *Chamber of Commerce*, the dissent discussed whether the premises in question were premises on which the duties of the employee Anderson were performed.[27] Anderson was on twenty-four hour call and his duties included handling complaints, answering questions, overseeing reservations, and supervising the operation of the restaurant. These duties were usually discharged in person at the motel, but some duties were handled by telephone from his home. In addition, he occasionally entertained motel guests in the home furnished by his employer. These facts led to the conclusion that Anderson performed a portion of his duties in the house provided by his employer.[28] It would appear that a motel manager awaiting a phone call from his reservations clerk about a problem is not unlike a state highway patrolman in a restaurant awaiting a phone call from his dispatcher, which was the situation in *Barrett*[29] and *Morelan*.[30]

Judge McAllister had difficulty understanding why the First Circuit in *Dole* affirmed solely on the basis of Judge Raum's Tax Court concurring opinion which called for the reversal of *Anderson*. His difficulty stemmed from the fact that the *Dole* case was distinguishable from *Anderson*, and the decision in *Dole* could have no bearing on *Anderson*, which was at that time pending on appeal to the Sixth Circuit. Further, he felt that the decision in *Dole* suffered from

> insufficient development of the issues, and the resolution of the problem . . . lack[ed] the thrust, persuasiveness, and marshalling of argument necessary to overcome the well-reasoned conclusions of all but three judges of the Tax Court . . . .[31]

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26 Judge McAllister also considered Boykin v. Commissioner, 260 F.2d 249 (8th Cir. 1958), where the Commissioner failed to raise the "business premises" question in the case of a physician who resided in a house provided by the government which was some distance from the hospital where he performed his duties. From this "failure" on the part of the Commissioner, Judge McAllister drew the conclusion that the case was authority for the proposition that the statute does not envisage that any duties of the employee must be performed in the house in which he is obliged to live as a condition of his employment.

27 It is interesting to note that the majority opinion dispensed with any consideration of this question, although the majority's opinion indicated that the place where an employee performs a significant portion of his duties would be "business premises."

28 371 F.2d at 76.

29 321 F.2d at 912 (patrolmen had to advise their superior when and where they stopped for food in order that they could be reached if needed).

30 *See* note 16 *supra.*

31 371 F.2d at 79.

Under Section 119, to exclude the value of lodging from gross income, three tests[32] must be met: (1) The lodging must be furnished for the convenience of the employer;[33] (2) the employee must be required to accept the lodging as a condition of his employment;[34] and, (3) the lodging must be furnished on the business premises of the employer. The definition of "on the business premises of the employer" has been the subject of many diversified opinions by the courts and writers.[35] *Morelan* and *Barrett* indicated a liberal interpretation of "business premises." *Chamber of Commerce* held that it was enough that the premises were furnished by the employer and the employee performed duties thereon. *Dole* took a somewhat similar approach, holding that the living quarters must be either an integral part of the business property or premises upon which the employer carries on some business activities. And now, *Anderson* seems to take the most narrow view, holding that the ownership of the property is not significant and the test is that either the employee or the employer must conduct a *significant* portion of their respective duties or business on the premises.

It is arguable that the term "business premises" can be construed to encompass premises acquired by the employer for business purposes as well as premises where business is conducted. The major consideration should be whether the lodging is furnished primarily for the convenience of the employer or primarily for the convenience of the employee.[36] Narrow distinctions based on the distance to the site of major activity, the extent of duties performed on the premises, and the classification of the living quarters as an integral part of the business property go to the element of convenience to the employer or the employee; but they alone should not be determinative of the

32 Treas. Reg. § 1.119-1(b) (1956), *as amended*, T.D. 6745, 1964-2 CUM. BULL. 42.

33 *See generally* Prigal, *New Rule on Faculty Meals Extends Convenience-of-Employer Exclusion*, 14 J. TAXATION 149 (1961); Gutkin & Beck, *Some Problems in "Convenience of the Employer,"* 36 TAXES 153 (1958); Gornick, *The 1954 Internal Revenue Code: Sick Pay, Meals, Lodging, Salesmen's Expenses*, 41 A.B.A.J. 612, 615 (1955).

34 *See generally* 5 B.C. IND. & COM. L. REV. 474 (1964).

35 *See generally* Bailey, *Compensation With the Fringe on Top*, N.Y.U. 16th INST. ON FED. TAX 75, 82 (1958) (predicting broad definition); Erbacher, *Meals or Lodging Furnished for Convenience of Employer*, 32 TAXES 826 (1954) (expressing doubt that Section 119 would end confusion).

36 *See* SENATE COMM. ON FINANCE, 83D CONG., 2D SESS., REPORT ON SECTION 119 OF INTERNAL REVENUE CODE OF 1954 (Comm. Print 1954): "Your committee has provided that the basic test of exclusion is to be whether the meals or lodging are 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)."

question of excludability. Rather, such elements should be evidentiary and used to assist the trier of fact in determining whether the premises fulfill a business need of the employer and are for his convenience, or whether the premises are merely owned by the employer and provided to the employee for the latter's convenience. If the premises fulfill a substantial business need, then they should be deemed "business premises" within the meaning of Section 119. On the other hand, if the property is merely owned by the employer, and the employee need not reside there in order to properly perform his duties, then it would seem that the premises are not for the convenience of the employer, and not "business premises."

In the present case, the fact that the dwelling was located upon property separate and apart from the motel prevents the court from saying that the lodging was provided on the business premises of the employer even though there was no issue in *Anderson* that the meals and lodging were furnished for the convenience of the employer.

While rigid adherence to the rule expressed by the majority has the advantage of ease of application,[37] possible future results might be inconsistent. For example, a corporation could construct a dwelling at a distant point on a large motel property, and the rental value would be excludable from the manager's gross income. But if the corporation chose to build a house directly across the street on property not integrated with the motel property, then the rental value would not be excludable, even though the dwelling might be much nearer the manager's office than one constructed on a distant corner of the motel property. But the "across-the-street manager" can yet qualify for the exclusion—he merely ensures that he performs a "significant portion" of his duties in his residence.

The court's intensive concern with the meaning of "on the business premises" is unwarranted. The determinative question should be whether the lodging was provided primarily for the convenience of the employer. Duty, distance, integration, ownership, and condition of employment should be considered merely as an aid in making that determination.

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[37] Another equally workable solution is suggested in Fischer, *Tax Free Income: Compensation in Kind and Quasi-in-Kind*, 5 WM. & MARY L. REV. 46 (1964) (tax-free nature of meals and lodging should be abolished).