San Diego Law Review

Volume 4 | Issue 2 Article 6

6-1-1967

Federal Income Tax - Taxpayer Who Carried Briefcase Sized Bag of Tools Allowed To Deduct Transportation Expenses Incurred in Driving To and From His Home and Various Work Sites As an Ordinary and Necessary Business Expense. Sullivan v. Commissioner (2d Cir. 1966)

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FEDERAL INCOME TAX—TAXPAYER WHO CARRIED BRIEFCASE-SIZED BAG OF TOOLS ALLOWED TO DEDUCT TRANSPORTATION EXPENSES INCURRED IN DRIVING TO AND FROM HIS HOME AND VARIOUS WORK SITES AS AN ORDINARY AND NECESSARY BUSINESS EXPENSE. *Sullivan v. Commissioner* (2d Cir. 1966)

Lawrence D. Sullivan, a wire lather employed by a New York City construction company incurred $1,494.72 of expenses for the use of his car in driving to and from his Staten Island home and different job sites in and around New York City.[1] He deducted this amount as an ordinary and necessary business expense on his federal income tax return for 1962.[2] Sullivan carried the tools of his trade in a briefcase-sized bag which weighed approximately thirty-two pounds when filled with tools. He was unable to leave his tools at the various job sites as there were no safe storage places, and often, his employer would telephone him in the evening and direct him to go to a different job site the following morning. Sullivan testified that he had a bad

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[1] Sullivan's deduction was not for transportation costs between job sites. Any expenses incurred driving between job sites would be deductible without question, Treas. Reg. § 1.62-1(g) (1958).

[2] INT. REV. CODE OF 1954, § 162. TRADE OR BUSINESS EXPENSES.

(*a*) *In general.*

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . .

A deduction allowable under Section 162 may fall within either of two categories; it may be a deduction *for* adjusted income, or it may be *from* adjusted gross income.

INT. REV. CODE OF 1954, § 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and business deductions.*

The deductions allowed by this chapter . . . which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and business deductions of employees.*

. . . .

(B) *Expenses for travel away from home.*

The deductions allowed by part VI . . . which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) *Transportation expenses.*

The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

If the allowable deduction cannot be found within the purview of Section 62, the deduction is then taken *from* adjusted gross income. INT. REV. CODE of 1954, § 63. TAXABLE INCOME DEFINED. (*a*) *General rule.* "Except as provided in subsection (b), for purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter . . . ."

The Second Circuit apparently took the position that Section 162(a) applied without reference to travel or transportation expenses; therefore, the expenses in question were deductible from adjusted gross income.

knee which made walking and standing difficult. The deduction was disallowed by the Internal Revenue Service. The Tax Court, in affirming the disallowance held that an "employee's trips to and from work which could only be characterized as nonbusiness trips when no tools are carried, are not transformed into business trips of the employee by his carrying his tools to and from his place of employment."[3]

On appeal to the Second Circuit Court of Appeals, *held*, reversed and remanded. Petitioner should be allowed to deduct his reasonable driving expenses upon a showing that he would have used public transportation but for the fact that he had to carry his tools.[4] If the petitioner would have driven to and from work, whether or not he carried tools, then he should be allowed a deduction based on a proportionate share of the total transportation expense which reasonably would be allocated to the expense of transporting the tools. *Sullivan v. Commissioner*, 368 F.2d 1007 (2d Cir. 1966).

Generally, the cost of transportation from one's home to his place of employment is a personal expense, and thus nondeductible under Section 162.[5] However, recent opinions demonstrate that the courts are closely examining each case to determine whether there are additional facts indicating that the expenses are actually ordinary and necessary business expenses[6] rather than personal, commuter ex-

[3] Lawrence D. Sullivan, 45 T.C. 217, 221 (1965).

[4] The court in allowing either a partial or full transportation deduction subjected the deduction to a maximum based upon the cost of any feasible alternative means of storing taxpayer's tools. Sullivan v. Commissioner, 368 F.2d 1007, 1009 (2d Cir. 1966).

[5] The principal authority for this rule is Commissioner v. Flowers, 326 U.S. 465 (1946) (taxpayer's travel expense between home and office in a different city held nondeductible). A more recent statement of the rule is found in Steinhort v. Commissioner, 335 F.2d 496, 503 (5th Cir. 1964). "Deeply ingrained in the whole tax structure . . . is the basic proposition that the cost of going to and from home and an established place of business is a nondeductible personal expenditure." *See* INT. REV. CODE of 1954, § 262 (". . . no deduction shall be allowed for personal, living, or family expenses.") and Treas. Reg. § 1.262-1 (1959). ". . . [T]he taxpayer's cost of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses." Treas. Reg. § 1.162-2 (1959) "(e) Commuters' fares are not considered as business expenses and are not deductible."

[6] "Ordinary" and "necessary" have been defined in the statutory context as follows: "(1) An expense is 'ordinary,' within the meaning of these statutory provisions, where the expense is common and accepted in the general industry or type of activity in which the taxpayer is engaged; and (2) An expense is 'necessary' where it is appropriate and helpful in furthering the taxpayer's business or income-producing activity." Lamont, *Controversial Aspects of Ordinary and Necessary Business Expense*, 42 TAXES 808 (1964).

The courts have defined the terms as follows: "To be deductible under Section 162(a), an expenditure must constitute an expense of carrying on a trade or business, as distinguished from some other type of expenditure made in connection with the taxpayer's business." Burnett v. Commissioner, 356 F.2d 755, 759 (5th Cir. 1966).

penses. This reevaluation is particularly apparent in cases involving taxpayers carrying tools to and from work.[7]

In *Crowther v. Commissioner*,[8] the Ninth Circuit approved a deduction of transportation expenses incurred by a logger traveling to and from northern California logging sites. Although the Ninth Circuit indicated that Crowther's transporting of heavy tools was an important factor,[9] the decision seemed to rest upon several factors: (1) The taxpayer worked at the various sites temporarily; (2) there was no housing available near the work site; and, (3) there was no public transportation. The Ninth Circuit subsequently held: "We do not think that our decision in *Crowther* depends on the fact that the taxpayer in that case was required to carry his tools into the woods with him."[10]

In *Rice v. Riddel*,[11] the district court allowed a deduction for transportation expenses incurred by a musician who lived and performed in metropolitan Los Angeles. He "operated his business" from his home, and deducted the cost of driving his automobile to the various temporary employment locations. To use public transportation would have been impractical because the taxpayer had to carry several bulky musical instruments. The Internal Revenue Service, in a later

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"Ordinary as used in the statute [§ 162] has the connotation of normal, customary, and usual." Okemah Nat'l. Bank v. Wiseman, 253 F.2d 223, 226 (10th Cir.), *cert. denied*, 358 U.S. 821 (1958).

7 Crowther v. Commissioner, 269 F.2d 292 (9th Cir. 1959); Rice v. Riddell, 179 F. Supp. 576 (S.D. Cal. 1959). In Charles Crowther, 28 T.C. 1293 (1957), the Tax Court allowed the taxpayer to deduct the expense of transporting tools, although not allowing a deduction for the *total* transportation expense. This decision was contrary to the previous rule expressed by the Treasury in Rev. Rul. 25, 1956-1 CUM. BULL. 152:

> The expenses incurred by an employee in using his automobile for commuting between his place of abode and his place of work (principal or regular post of duty or employment), regardless of the distance involved, represent nondeductible personal expenses within the purview of section 262 of the Internal Revenue Code of 1954, notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work.

The *Crowther* decision was followed by later decisions allowing a deduction for the expenses involved in transporting tools. Francis Eaton, 27 P-H Tax Ct. Mem. 52 (1958) (mechanic allowed a deduction for tool transportation expense); Henry P. Canclini, 26 P-H Tax Mem. 956 (1957) (logger allowed deduction for tool transportation expense); Benjamin C. Allenby, 26 P-H Tax Ct. Mem. 794 (1957) (logger allowed deduction for tool transportation expense). *Contra*, Ewell L. Teer, 33 P-H Tax Ct. Mem. 545 (1964).

8 269 F.2d 292 (9th Cir. 1959) (extending the ruling of the Tax Court to include the total transportation expense).

9 *Id.* at 299.

10 Mathews v. Commissioner, 310 F.2d 98 (9th Cir. 1962) (taxpayer, who did not carry tools, allowed to deduct total expense of transportation to and from work as a choker setter (logger) where there was no public transportation).

11 179 F. Supp. 576 (S.D. Cal. 1959).

ruling involving the same facts, implied that a deduction for the total cost of private transportation would be allowed under Section 162 if the taxpayer would have used public transportation but for the tools.[12]

The Tax Court held that Sullivan's transportation expenses were purely personal, distinguishing the Ninth Circuit's ruling in *Crowther* as applicable only to the "very special facts of that case."[13] The Tax Court's ruling that the taxpayer's carrying of his tools did not transform the expense into a business expense placed the Tax Court in opposition to the district court decision in *Rice* and the subsequent Revenue Ruling.[14] The Second Circuit also considered the Internal Revenue Service's Revenue Ruling too narrow[15] and would allow the taxpayer to deduct the reasonable cost of transporting his tools even if he would not have used public transportation.

Assuming that the Second Circuit was correct in liberalizing the existing law, questions arise regarding the propriety of the rule. The Second Circuit would allow a full deduction for transportation expenses to one who would use public transportation but for the fact that tools had to be carried; however, if public transportation would not be used, then only a partial deduction would be allowed. The application of this rule would result in discrimination against a handicapped person who cannot deduct the expense of his private transportation,[16] and against one who has no access to public transportation. For example, under the *Sullivan* rule, a person who is

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12 Rev. Rul. 100, 1963-1 CUM. BULL. 34.

. . . .

Revenue Ruling 56-25. C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him.

13 Lawrence D. Sullivan, 45 T.C. 217, 219 n.1 (1965).

14 Rev. Rul. 100, 1963-1 CUM. BULL. 34.

15 368 F.2d at 1008.

16 The courts have consistently held that the expense of private or special transportation necessitated by a physical disability is a personal expense and thus nondeductible. Donnelly v. Commissioner, 262 F.2d 411 (2d Cir. 1959) (taxpayer could not practically use public transportation because of disease, but was not allowed deduction for cost of special private transportation); John C. Bruton, 9 T.C. 882 (1947) (diseased taxpayer not allowed transportation expense even though he would have been unable to work absent the expenditure). The *Donnelly* court also pointed out that the expense could not be deducted under the provisions allowing for medical deductions. *See* Walter E. Buck, 47 T.C. No. 10 (Dec. 10, 1966).

healthy and who would use public transportation would be able to deduct his total transportation expense if he had to carry tools which would make public transportation impractical; however, the person engaged in the same trade or business and who carried the same tools, but who had a personal handicap which made public transportation impractical, or who had no access to public transportation would only be allowed a deduction commensurate with the expense of transporting his tools.

The *Sullivan* court would allow a person who would use private transporation, even if he did not have to carry tools, to allocate the expense of transportation between the expense of transporting the person and the expense of transporting the tools, and then, to deduct the tool transportation expense. Although the idea of allocating between "tool expenses" and "commuting expenses" is not novel,[17] the court failed to set any guidelines as to the method of allocation.

To allow a deduction for the expense of carrying a small amount of tools would seem to open the door to deductions for a large group of taxpayers who regularly carry items related to their trade or business.[18] It is possible, however, that Sullivan should have been allowed a deduction for transportion expenses because he apparently traveled substantial distances to various temporary job sites.[19]

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17 The Tax Court has previously held that the total transportation expense could be allocated between personal transportation and tool transportation with a deduction allowed for the latter. Charles Crowther, 28 T.C. 1293 (1957); Francis Eaton, 27 P-H Tax Ct. Mem. 52 (1958) (on proper evidence, the cost of transporting tools may be deducted from the total expense of transportation); Henry P. Canclini, 26 P-H Tax Ct. Mem. 956 (1957); Benjamin C. Allenby, 26 P-H Tax Ct. Mem. 794 (1957). None of these cases, however, has provided any guidelines as to how to make the allocation. The computations involved in each case indicate that a percentage is deducted, but the computation of the percentage has never been revealed by the courts.

There are several possibilities for developing guidelines for allocating transportation expenses. First, a predetermined percentage might be established which would be applicable in all tool transportation deduction cases. A second method would be to allow the taxpayer to deduct the expense of having the tools carried by a delivery service if such expense did not exceed the total cost of transportation. A third possibility would be to allow a deduction based on the proportionate weight of the tools to the total weight of the tools and the taxpayer.

18 The facts in *Sullivan* are similar to those in Ewell L. Teer, 33 P-H Tax Ct. Mem. 545 (1964), thus the Circuit Court might have done well to have followed the *Teer* case. In *Teer*, a nurse was not allowed to deduct any transportation expenses, even though she carried a satchel with her "tools," worked at various places temporarily, and was partially disabled. The tools which Sullivan carried weighed little more than a briefcase filled to its capacity. It is possible that lawyers, doctors, salesmen, teachers, and others who must carry papers and other items necessary to their trade or business will be allowed to deduct the cost of transporting these articles from their homes to their place of employment.

19 The recent trend is to allow a taxpayer who must travel long distances to and from temporary work sites, where neither adequate family housing nor public trans-

With the above mentioned problems in mind, the following rule is suggested. It should be ascertained whether or not the particular trade or business in which the taxpayer is engaged requires that he carry bulky tools which make public transportation a practical impossibility. If it is determined that members of the trade or business are required to carry such tools, then the total expense of transportation should be an allowable deduction whenever the taxpayer carries the tools regardless of his individual needs or desires for private transportation. This deduction should be limited by the smallest of the following: (1) The cost of having the tools delivered by a delivery service; (2) the excess of automobile expenses over the lesser of (a) the cost of mass public transportation, if available, or (b) the cost of taxi service, if available; or, (3) the storage cost at the job site if it would be feasible for the taxpayer to store his tools.

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portation is available, to deduct the expense of such daily transportation between his permanent home and the temporary work site. Mathews v. Commissioner, 310 F.2d 98 (9th Cir. 1962); Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962) (construction worker allowed to deduct transportation expense to and from temporary work site based on nearest feasible housing); Crowther v. Commissioner, 269 F.2d 292 (9th Cir. 1959); Carlson v. Wright, 181 F. Supp. 568 (E.D. Idaho 1959) (taxpayer allowed to deduct the total expense of transportation when the distance traveled was long and the work site only temporary).

There is no apparent difference between the taxpayer who travels to and from temporary work sites in rural areas, and the taxpayer, such as Sullivan, who travels substantially the same distance to temporary work sites in and around a large city.