

The State of South Carolina

February



Office of the Attorney General

T. TRAVIS MEDLOCK  
ATTORNEY GENERAL

JOHN C. CALHOUN BUILDING  
POST OFFICE BOX 125  
COLUMBIA, S.C. 29214  
TELEPHONE 803-758-2211

August 16, 1985

Honorable Earle E. Morris  
Comptroller General  
Wade Hampton Office Building  
Columbia, South Carolina 29211

Dear Mr. Morris:

The following was enacted in the 1985-1986 General Appropriations Act:

"Provided, Further, that the regulations of the Comptroller General established for meals and travel reimbursement shall contain a provision to prohibit the reimbursement of any meal expenses which are not allowable as an expense deduction under the Federal Internal Revenue Code."

You have asked for an opinion as to how the Comptroller General's Office should administer this proviso and whether any party is exempted from its coverage. Each of these questions is addressed below.

A. DEDUCTIBILITY UNDER THE INTERNAL REVENUE CODE

The Comptroller's Office is required to provide by regulation that reimbursement of meal expenses shall be prohibited unless such expenses are allowable under the Internal Revenue Code as a deduction to the party making the expenditure. While it is not possible to address all factual circumstances that may arise for which reimbursement may be sought, some guidelines can be stated.

Meals may be deducted under I.R.C. § 162(a)(2) if three tests are met. Commissioner of Internal Revenue v. Flowers, 326 U.S. 465 (1946). These tests are (1) the expense must be an ordinary and necessary travel expense, (2) which was incurred away from home, and (3) which was incurred in

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pursuit of the employer's business. These tests can be generally described.

1. ORDINARY AND NECESSARY TRAVEL EXPENSE

The meal expense must be ordinary and necessary to the employer's business. An expense is ordinary if it is a common or normal means of meeting a need of the employer. Donald G. Graham v. Commissioner of Internal Revenue, 35 TC 273 (1960). Further, an expense is necessary if it is appropriate or helpful to the employer's business. Welch v. Helvering, 290 U.S. 111 (1933). Meals have been traditionally found to be ordinary and necessary travel expenses and are identified as such by the Internal Revenue Service. See Reg. § 1.162-2(a).

2. MEAL EXPENSE INCURRED AWAY FROM HOME

Under the "away from home" test three issues having significance to the Comptroller General's office arise. First, where is one's home located. Second, how long is one required to be away from his home in order to deduct his meal expenses. Finally, on long work assignments away from home, does one's home "move" to the new assignment for purposes of deductibility of meal expenses. Each of these issues are discussed below.

The Internal Revenue Service has held the home from which one must be away in order to have meal expenses deducted is one's place of employment as opposed to one's residence. Rev. Rul. 75-432, 1975-2 C.B. 60; Rev. Rul. 60-189, 1960-1 C.B. 60; Rev. Rul. 54-497, 1954-2 C.B. 75. Such a view has long been supported by the Tax Court. Mort L. Bixler, 5 B.T.A. 1181 (1927); John B. Kennedy v. Commissioner of Internal Revenue, 40 TCM 958, 960 (1980). T. C. Memo 1980-310. While some courts of appeal have differed with the Internal Revenue Service's position<sup>1</sup> the more

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<sup>1</sup>Rosenspan v. United States, 438 F.2d 905 (2d Cir. 1971) cert. denied 404 U.S. 864; Six v. United States, 450 F.2d 66 (2d Cir. 1971) and Combs v. Commissioner, 608 F.2d 1269 (9th Cir. 1979) where home generally was found to mean residence.

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predominant view is to follow the Service's position<sup>2</sup>. The geographic area of one's home from which one must be away is the general metropolitan area of his post of duty. See Rev. Rul. 55-109, 1955-1 C.B. 261.

Further the Internal Revenue Service<sup>3</sup> and the courts have long established that the "away from home" test is met only if the trip required the employee to stop for sleep or rest. This position was upheld in United States v. Correll, 389 U.S. 299 (1967). There a taxpayer's breakfast and lunch expenses were disallowed as deductions since the taxpayer, who began work at 5 a.m. and returned home at 5:30 p.m., made daily trips not requiring sleep or rest. In Barry v. Commissioner, 435 F.2d 1290 (1971), one day business trips of 16 to 19 hours did not meet the sleep or rest rule even though the taxpayer actually rested once or twice in his car

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<sup>2</sup>The First, Third, Fourth, Seventh and Eighth Circuits have generally followed the Internal Revenue Service's position. Amoroso v. Commissioner, 193 F.2d 583 (1st Cir. 1952); Chimento v. Commissioner, 438 F.2d 643 (3d Cir. 1971); Barnhill v. Commissioner, 148 F.2d 913 (4th Cir. 1945); Curtis v. Commissioner, 449 F.2d 225 (5th Cir. 1971); Markey v. Commissioner, 490 F.2d 1249 (6th Cir. 1974); England v. United States, 345 F.2d 414 (7th Cir. 1965), cert. denied, 382 U.S. 986; and Jenkins v. Commissioner, 418 F.2d 1293 (8th Cir. 1969).

<sup>3</sup>Rev. Rul. 54-497, 1954-2 C.B. 75,78 (superseded in part by Rev. Rul. 75-432, 1975-2 C.B. 60, modified by Rev. Rul. 75-169, 1975-1 C.B. 59 and 76-453, 1976-2 C.B. 86) states that a taxpayer is away from home "if his absence on business from his principal or regular post of duty [is] of such duration that he cannot leave from or return to that location at the start and finish of, or before or after each day's work ..."

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during the day.<sup>4</sup>

Revenue Ruling 68-663, 1968-2 C.B. 71 also addresses one day trips. A civilian Federal employee left his post of duty at 9 a.m. and returned at 10 p.m. and incurred expenses for his noon and evening meals. The ruling held as follows:

"... the meal expenses incurred ... on the one day trip that did not require a stop for sleep or rest are not deductible ... under section 162(a) of the Code. However, if the ... employee had been [on a trip] for a period of time that did require him to stop for sleep or rest, the [meal expenses] would be deductible ... under section 162(a) ..."

Finally, temporary assignments to a new place of employment may cause difficulty in determining one's "home" for purposes of deductibility. The Internal Revenue Service has held that a taxpayer employed temporarily, as opposed to indefinitely, away from his regular place of business is considered to be away from home under § 162(a)(2) and may deduct his meals and lodging at his temporary location. Rev. Rul. 75-432, 1975-2 C.B. 60; Rev. Rul. 60-189, 1960-1 C.B. 60. In other words, meals are deductible on temporary assignments to a new job site where the sleep or rest rule is met since one's tax home has not "moved" to the new job location. However, meals are not deductible on indefinite assignments to a new job site since one's tax home is considered to have "moved" to the new job location.

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<sup>4</sup>Private letter Ruling 7803046 held that business trips by employees of 10 to 16 hours did not meet the sleep or rest requirement. "An employee may deduct the expenses for meals on a business trip ... only when the trip lasts substantially longer than an ordinary day's work, the employee cannot reasonably be expected to make the trip without ... substantial sleep or rest and the release from duty [to obtain sleep or rest] is with the employee's ... acquiescence. A brief interval ... to eat but not to obtain substantial sleep or rest does not meet the requirement ... on business trips completed within one day."

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The distinction between temporary and indefinite is based on facts decided on a case by case approach. The most important factor is the taxpayer's expectation as to the duration of the assignment. Rev. Rul. 60-189, 1960-1 C.B. 60, 63, James M. Waldrop, 36 T.C.M. 780 (1977). Generally, if the taxpayer believes his stay will be less than one year, such is considered temporary even if the actual stay is more than one year. Rev. Rul. 60-189, 1960-1 C.B. 60, 63. While the temporary-indefinite duration test has not been uniformly followed<sup>5</sup> most courts have accepted it. Eg. Commissioner v. Peurifoy, 254 F.2d 483 (4th Cir. 1957) aff'd. per curiam, 358 U.S. 59(1958); Claunch v. Commissioner, 264 F.2d 309 (5th Cir. 1959).

### 3. MEAL EXPENSES INCURRED IN PURSUIT OF THE EMPLOYER'S BUSINESS

On a trip which is partly business and partly personal meal expenses while traveling to or from the destination are deductible if the trip is related primarily to the employer's business. Reg. 1.162-2(b)(1). Meal expenses at the destination are deductible if they are incurred pursuing the employer's business. In determining whether a trip is primarily personal or not, the percentage of time spent on personal versus business activities is an important element. Reg. 1.162-2(b)(2).

In conclusion the Comptroller's office may not reimburse meal expenses unless the expenses are deductible under the Internal Revenue Code. Meal expenses are deductible under § 162(a)(2) where the expense is an ordinary and necessary travel expense incurred away from home in pursuit of the employer's business. Hopefully, the discussion presented above will provide general guidelines to enable your office to determine if meal reimbursements are allowable.

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<sup>5</sup>Harvey v. Commissioner, 283 F.2d 491 (9th Cir. 1960). There the court found one's tax home changed when the employee had a reasonable probability that he may be employed "for a long period of time". The court further held the indefinite duration requirement was incorrect since it was unreasonable to expect an employee on an indefinite assignment to move his residence.

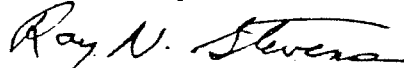
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B. NO EXCEPTIONS TO THE PROVISIO

The proviso expressly provides that meal expenses shall not be reimbursed unless such expenses are allowable as a deduction under the Internal Revenue Code. The language of the enactment does not provide any exceptions from its coverage. Where the words of a statute are clear, the Legislature must have intended to mean what it has plainly expressed and thus, there is no room for construction. Beaty v. Richardson, 56 S.C. 173, 34 S.E. 73,76 (1899). In this matter the proviso is clear and no exceptions have been made from its coverage.


Sincerely,



Ray N. Stevens  
Deputy Attorney General

RNS/jws

I CONCUR:

  
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JOE L. ALLEN, JR.  
Chief Deputy Attorney General

NOTE: You may wish to communicate directly with the Internal Revenue Service on questionable items. The State's reimbursement is upon condition that the payment is deductible for federal income tax purposes. In questionable cases, only a determination by the Service will resolve the matter.