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Casenotes: Income Tax — Section 162 — Traveling Expense Deductions — Absent Principal Place of Business, Traveling Salesperson's Tax Home Is Geographic Concentration of Income-Producing Activity. Daly v. Commissioner, 662 F.2d 253 (4th Cir. 1981)

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INCOME TAX — SECTION 162 — TRAVELING EXPENSE DEDUCTIONS — ABSENT PRINCIPAL PLACE OF BUSINESS, TRAVELING SALESPERSON'S TAX HOME IS GEOGRAPHIC CONCENTRATION OF INCOME-PRODUCING ACTIVITY. *Daly v. Commissioner,* 662 F.2d 253 (4th Cir. 1981).

I. INTRODUCTION

In *Daly v. Commissioner,*[1] the United States Court of Appeals for the Fourth Circuit created an arbitrary tax home for a traveling salesperson who maintained no office or otherwise definable principal place of business within his assigned territory. The Fourth Circuit has thus expanded the already fictionalized concept of treating a place of business as a home for tax purposes. Traditionally, when no definable principal place of business existed courts deemed the tax home to be the business site closest to the taxpayer's residence. This casenote analyzes the effect of the Fourth Circuit's ruling on traveling expense deductions and suggests a possible alternative to determining the tax home of the traveling taxpayer.

II. FACTUAL SETTING

Lee Daly, a traveling salesman for the Myrtle Desk Company of North Carolina, maintained a family home and office in McLean, Virginia.[2] Since 1965, he had been assigned by his employer to a tri-state territory consisting of eastern Pennsylvania, New Jersey, and Delaware. Daly made weekly trips to his territory, leaving McLean early Tuesday morning, staying overnight in or around the Philadelphia area for two nights, and returning to Virginia on Thursday evening. He spent Mondays and Fridays completing paperwork and other incidental tasks in his at-home office. Daly was not required by his employer to maintain an office at home nor within his territory. He was not reimbursed for any expenses incurred in connection with his employment and was compensated on a commission basis.

The petitioners, Lee and Rosemarie Daly, remained in Virginia primarily to enable Mrs. Daly to keep her job as manager of the Georgetown Uniform Company in Washington, D.C.[3] On their joint income tax return in 1975, the Dalys deducted as traveling expenses under section 162(a)(2) of the Internal Revenue Code of 1954,[4] the cost

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1. 662 F.2d 253 (4th Cir. 1981) (en banc).
2. *Id.* at 254.
3. Daly v. Commissioner, 72 T.C. 190, 194 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).
4. Unless otherwise indicated, all section references will be to the Internal Revenue Code of 1954, as amended. Section 162 provides in pertinent part:

   (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, including . . . .

   . . . .

   (2) traveling expenses (including amounts expended for meals and lodg-

of the husband's transportation between the McLean residence and Philadelphia, and meals and lodging while in the Philadelphia area. The deductions were disallowed by the Commissioner of Internal Revenue as being personal in nature and therefore nondeductible. The Dalys petitioned the Tax Court of the United States which upheld the Commissioner's assessment of a deficiency.[5] A divided panel of the Court of Appeals for the Fourth Circuit reversed, holding that Daly was entitled to designate McLean as his tax home in the absence of an office or residence in Philadelphia.[6] Upon petition of the Commissioner, the appeal was reheard by the court sitting en banc[7] and the judgment of the tax court was affirmed.[8]

III. HISTORY OF TRAVELING EXPENSE DEDUCTIONS

A. Legislative History

Deductions for traveling expenses were first provided for in the Revenue Act of 1913[9] and later expanded in the Revenue Act of 1918, which allowed a deduction for ordinary and necessary traveling expenses incurred while carrying on a business.[10] In one of the first administrative rulings issued by the Treasury Department regarding this section of the 1918 Act, meal and lodging expenses were deductible only to the extent they exceeded similar amounts that would have been spent by the taxpayer while at home.[11] The Revenue Act of 1921 liberalized the statute by allowing deductions for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."[12]

Legislative history indicates that the amendment contained in the 1921 statute was enacted to allow traveling salespersons proper deductions for meals, lodging and transportation, but the context in which the word "home" was used was not made clear.[13] The text of the cur-

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ing other than amounts which are lavish or extravagant under the circumstances) *while away from home* in the pursuit of a trade or business. . . .

I.R.C. § 162(a)(2) (1982) (emphasis added).

5. Daly v. Commissioner, 72 T.C. 190 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).
6. Daly v. Commissioner, 631 F.2d 351, 354 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).
7. En banc refers to a session where the entire membership of the court will participate in the decision, rather than the regular quorum. BLACK'S LAW DICTIONARY 472 (5th ed. 1979).
8. Daly v. Commissioner, 662 F.2d 253, 255 (4th Cir. 1981)(en banc).
9. Revenue Act of 1913, ch. 16, § IIB, 38 Stat. 167.
10. Revenue Act of 1918, ch. 18, § 214 (a)(1), 40 Stat. 1066.
11. T.D. 3101, 1920-3 C.B. 191.
12. Revenue Act of 1921, ch. 136, § 214(a)(1), 42 Stat. 239.
13. 61 CONG. REC. 6673 (1921). For a discussion of House and Senate debates, see Milton, Logan & Tallant, *The Traveling Taxpayer: A Rational Framework for his Deductions*, 29 U. FLA. L. REV. 119 (1976).

rent section 162(a)(2) was reenacted without change or further explanation in the 1939[14] and 1954[15] Internal Revenue Codes.

B. Judicial Interpretation

The legislative intent regarding the use of the word home, as it appears in the federal tax statutes allowing deductions for business travel expenses, has been the subject of much litigation.[16] The need for judicial intervention stems from a 1927 Board of Tax Appeals'[17] decision, *Bixler v. Commissioner,*[18] which adopted a nontraditional meaning of the word home in stating that traveling expenses were to be allowed while a taxpayer was away from his "post of duty" or "place of employment."[19] This definition of home as one's principal place of business has become known as the *tax home concept.*[20] Although the Commissioner and the tax court, since *Bixler,* have consistently maintained that home refers to the taxpayer's principal place of business,[21] the judicial interpretation of the word remains unsettled.

The controversy had its origin in the federal courts of appeals. In 1945, the Court of Appeals for the Fourth Circuit upheld the Commissioner's interpretation of tax home in *Barnhill v. Commissioner.*[22] In this case, Judge Barnhill was elected to the state supreme court located in Raleigh, North Carolina, the state capitol, but maintained his pre-election residence in another city. He was denied traveling and living

14. I.R.C. § 23 (a)(1) (1939).
15. I.R.C. § 162 (a)(2) (1954). In 1962, Congress again amended the provision to limit business travel expenses to those which are not lavish and extravagant. Revenue Act of 1962, § 4(b), 76 Stat. 976-77.
16. See notes 33-34 and accompanying text *infra*.
17. The United States Board of Tax Appeals was retitled the Tax Court of the United States by the Revenue Act of 1942, ch. 619, § 504(a),(b), 56 Stat. 957.
18. 5 B.T.A. 1181 (1927).
19. *Id.* at 1184.
20. The ostensible purpose of employing home as a term of art rather than in its common usage was to prevent the deduction of commuting expenses. Deductions for personal, living or family expenses have expressly been prohibited by I.R.C. § 262. It is necessary, therefore, to distinguish between the terms *traveling expenses, transportation expenses*, and *commuting expenses* prior to any further discussion of I.R.C. § 162 (1981). *Traveling expenses* include the cost of any mode of transportation, meals and lodging, and any incidentals such as rental of sample rooms, telephones, stenographic services, baggage claims and reasonable tips. I.R.S. Pub. No. 17, at 62 (rev. Nov. 1981)(available through local I.R.S. Service Centers). *Transportation expenses* include fares of all kinds such as air, rail, bus, taxi and the operation of an auto used for business purposes. *Id.* at 64-66. *Commuting expenses* refer to local transportation costs arising from traveling between a taxpayer's residence and regular place of business. *Id.* at 64. For a general discussion of traveling expenses, see 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 25.91-.100 (rev. ed. 1979); Haddleton, *Traveling Expenses "Away From Home,"* 49 VA. L. REV. 125 (1963).
21. *See, e.g.,* Morgan v. Commissoner, 39 T.C.M. (CCH) 1263, 1265, T.C.M. (P-H) ¶ 80,082 (1980); Rev. Rul. 75-432, 1975-2 C.B. 60; Rev. Rul. 60-189, 1960-1 C.B. 60.
22. 148 F.2d 913 (4th Cir. 1945).

expenses while attending court in Raleigh, since the capitol was deemed his principal place of business and he was not away from home while there.[23] The Fourth Circuit felt that if home were to mean residence, commuter's fares could be deductible as expenses incurred "while away from home." The court concluded, therefore, that home meant the general locality where a taxpayer lived and worked, but did not go so far as to state that home and principal place of business were synonymous.[24] Just fifteen days earlier, the Court of Appeals for the Fifth Circuit had rejected the tax home concept in *Commissioner v. Flowers.*[25] Flowers was an attorney for a railroad company having its principal place of business in Mobile, Alabama. Flowers lived in Jackson, Mississippi and maintained an office there from which he performed most of his duties with respect to the railroad's business. The Fifth Circuit reversed the tax court's holding that Mobile was Flowers' tax home and applied the common usage of the word home to mean residence, thereby allowing travel expenses to and within the city of Mobile. The Supreme Court granted certiorari in 1946,[26] noting that the meaning of the word home as it applied to a taxpayer living in one city and working in another had "engendered much difficulty and litigation."[27] The Court went on to acknowledge both the tax court and administrative rulings that defined home as the equivalent of principal place of business. However, the opinion neither approved nor disapproved of the tax court's definition, but rather reversed the Fifth Circuit on the ground that Flowers' traveling expenses were not incurred as a result of the business needs of his employer.[28] The dissent, however, argued that Congress did not intend home to mean business headquarters.[29]

While *Flowers* did not end the tax home debate, the decision did discuss and clarify the language used in the Code by explaining the three prerequisites that must be satisfied in order to deduct traveling expenses.[30] The test as set forth by the Court in *Flowers* is: (1) the expense must be a reasonable and necessary traveling expense, as that term is generally understood;[31] (2) the expense must be incurred while

23. *Id.* at 917.
24. *Id.* While the Fourth Circuit has refused to hold home and principal place of business as synonymous, the "the same general locality" language finds the same result as the Commissioner's traditional analysis.
25. 148 F.2d 163, 164 (5th Cir. 1945), *rev'd on other grounds,* 326 U.S. 465 (1946).
26. Commissioner v. Flowers, 326 U.S. 465 (1946).
27. *Id.* at 471-72.
28. *Id.* at 472.
29. *Id.* at 497-80 (Rutledge, J., dissenting). The dissenting Justice recognized that the definition of home was aimed at preventing the deduction of commuting expenses, but did not believe the expenses incurred by Flowers could be regarded as such.
30. *Id.* at 470.
31. This includes such items as transportation fares, food, and lodging expenses incurred while traveling. *Id.*

away from home; and (3) the expense must be incurred in pursuit of business.[32] Thus, the Court in *Flowers* deemphasized the meaning of the word home and looked instead to the relationship between the expenses incurred and the exigencies of the employer's business. *Flowers* remains the leading case in interpreting section 162(a)(2) traveling expense deductions largely because the Supreme Court declined on two other occasions to clarify the term "tax home"[33] and because the circuit courts remain in conflict.[34]

C. Traditional Tax Home Analysis

Of all the occupations requiring frequent travel, it seems the outside sales representative[35] stands to be dealt the harshest treatment by the federal tax laws since the nature of this work requires duplication of living expenses. It was this inequitable treatment that Congress sought to remedy with the Revenue Act of 1921 by amending the existing Internal Revenue Code to provide a "measure of justice" for the commercial traveler.[36] Outside salespersons who work as employees may deduct the unreimbursed expenses of soliciting business for their employers,[37] but in all cases such unreimbursed traveling expense deductions must meet the requirements of section 162, as construed in *Flowers.*[38] However, in order to establish a point of origin for comput-

32. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade. *Id.*

33. Commissioner v. Stidger, 386 U.S. 287, 292 (1967) (Commissioner's definition will apply in the context of the military taxpayer); Peurifoy v. Commissioner, 358 U.S. 59, 61 (1958) (court of appeals made a fair assessment of the record and Supreme Court will not intervene).

34. Only the Second Circuit has consistently interpreted home as place of residence. Rosenspan v. United States, 438 F.2d 905, 912 (2d Cir.), *cert. denied,* 404 U.S. 864 (1971). The following cases have also been decided giving the word home its common usage: Brandl v. Commissioner, 513 F.2d 697, 699 (6th Cir. 1975); United States v. LeBlanc, 278 F.2d 571, 577 (5th Cir. 1960); Commissioner v. Janss, 260 F.2d 99, 102-03 (8th Cir. 1958); Wallace v. Commissioner, 144 F.2d 407, 410-11 (9th Cir. 1944). More frequently, circuit courts have accepted the tax home doctrine. *See* Chimento v. Commissioner, 438 F.2d 643, 644 (3d. Cir. 1971); Jenkins v. Commissioner, 418 F.2d 1292, 1293 (8th Cir. 1969); Wills v. Commissioner, 411 F.2d 537, 540-41 (9th Cir. 1969); Commissioner v. Mooneyham, 404 F.2d 522, 527-28 (6th Cir. 1968); England v. United States, 345 F.2d 414, 417 (7th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966); Steinhort v. Commissioner, 335 F.2d 496, 503 (5th Cir. 1964); Amoroso v. Commissioner, 193 F.2d 583, 586 (1st Cir.), *cert. denied,* 343 U.S. 926 (1952); Barnhill v. Commissioner, 148 F.2d 913, 917 (4th Cir. 1945). For the purposes of this casenote, therefore, the Commissioner's definition of home as principal place of business will be considered the majority view.

35. The I.R.S. has defined outside sales representative as one who does selling away from the employer's headquarters. Rev. Rul. 62-85, 1962-1 C.B. 13.

36. 61 CONG. REC. 5201 (1921).

37. Rev. Rul. 62-85, 1962-1 C.B. 13.

38. *See* text accompanying notes 30-32 *supra*.

ing traveling expenses "while away from home" and to determine the deductibility of meals and lodging, the existence of a principal place of business or post of duty must be established.[39] Locating the site of the taxpayer's place of business also permits a determination of whether transportation costs are incurred for business or personal reasons.

A taxpayer's place of business is a question of fact to be determined by particular circumstances.[40] For an individual with a single place of employment, defining the principal place of business presents no difficulty. Absent a particular building or terminal at which the taxpayer actually performs job duties, the principal place of business may be regarded as the employee's business headquarters or center of business activities.[41] In addition, since the principal place of business may include the entire city or general geographic area where the taxpayer usually carries on his or her trade,[42] a traveling salesperson is still considered to be inside the area of business activity anywhere within a reasonable commuting distance from the place of business.[43] Transportation expenses between business appointments or posts of duty within the general tax home area are deductible, but meals, lodging, and commuting expenses are not.[44]

1. Office in Residence

In situations where a sales representative maintains an office in his or her residence and travels to a legitimate business appointment from there, the transportation costs incurred in excess of those computed using the principal place of business as the point of departure are nondeductible commuting expenses.[45] Unless a taxpayer can prove the office in the residence is the principal place of business[46] or a minor post of duty,[47] any traveling expenses incurred using the residence office as the point of departure will fail the business exigency requirement of the *Flowers'* analysis.[48]

2. Multiple Business Locations

A more detailed analysis is required when the outside salesperson

39. Johnson v. Commissioner, 17 T.C. 1261 (1952), *acq.*, 1951-1 C.B. 2.
40. Rev. Rul. 75-432, 1975-2 C.B. 60, 61.
41. *Id.* at 62 (railroad employees). *See also* Rev. Rul. 55-235, 1955-1 C.B. 274 (fishermen); Rev. Rul. 55-236, 1955-1 C.B. 274 (truck drivers).
42. Rev. Rul. 56-49, 1956-1 C.B. 152; Rev. Rul. 55-109, 1955-1 C.B. 261.
43. Amoroso v. Commissioner, 193 F.2d 583, 585-86 (1st Cir.), *cert. denied,* 343 U.S. 926 (1952); Bell v. Commissioner, 13 T.C. 344, 349-50 (1949), *acq.*, 1949-2 C.B. 1.
44. Chandler v. Commissioner, 226 F.2d 467 (1st Cir. 1955); Denman v. Commissioner, 48 T.C. 439 (1967); Sherman v. Commissioner, 16 T.C. 332, 337-38 (1959), *acq.*, 1951-2 C.B. 4.
45. Matteson v. Commissioner, 514 F.2d 43 (8th Cir. 1975); Green v. Commissioner, 298 F.2d 890 (6th Cir. 1962).
46. Curphey v. Commissioner, 73 T.C. 766 (1980).
47. Rev. Rul. 75-432, 1975-2 C.B. 60.
48. *See* text accompanying notes 30-32 *supra*.

is soliciting business at two or more locations and exigencies of the occupation require the salesperson to spend a substantial amount of time at each of these locations. Again, the individual's tax home is deemed to be the site of the principal place of business or regular post of duty during the tax year[49] while the other places where work is performed are considered minor posts of duty. A taxpayer may deduct transportation expenses between the principal place of business and minor posts[50] and may also deduct the cost of meals and lodging if the trip requires sleep or rest.[51]

There are situations when it is difficult to distinguish which of a salesperson's posts of duty should be considered the principal place for tax home purposes. The Internal Revenue Service and the courts have set forth the more important factors to be considered, including the total time ordinarily spent at each of the business posts, the degree of business activity, and the amount of financial return from each post. Although no single factor is determinative, the revenue rulings give great weight to the amount of financial return,[52] while the courts are more apt to determine principal place of business as a function of the amount of time spent at a given location.[53] If the time spent at each location is substantially equal, the courts will locate the tax home at the business site closest to the taxpayer's residence.[54]

3. No Principal Place of Business

There is considerable conflict reflected in the tax court decisions regarding alternative sites to be used as a tax home when an outside sales representative is determined to have no principal place of business. The tax court has allowed the tax home of a salesperson in constant travel status to be located at the headquarter city of the employer's business[55] or the sales representative's permanent resi-

49. Rev. Rul. 61-67, 1961-1 C.B. 24, *modified,* Rev. Rul. 76-453, 1976-2 C.B. 86.
50. Rev. Rul. 75-432, 1975-2 C.B. 60. If a taxpayer's home is located at the minor post of duty, the deduction is limited to that part of the family's expenses attributable to the taxpayer's presence there while actually performing business duties. *Id. See also* Mazzotta v. Commissioner, 57 T.C. 427, 429 (1971), *aff'd per curiam,* 465 F.2d 1399 (2d Cir. 1972)(deductions disallowed when reason for returning to residence is personal, even though some minor business was performed); Hicks v. Commissioner, 9 T.C.M. (CCH) 1088, 1090-91, T.C.M. (P-H) ¶ 50,292 (1950) (court will apportion such travel expenses between personal and business).
51. United States v. Correll, 389 U.S. 299 (1967).
52. Rev. Rul. 54-147, 1954-55 C.B. 51, *modified,* Rev. Rul. 76-453, 1976-2 C.B. 86.
53. Folkman v. United States, 615 F.2d 493, 496 (9th Cir. 1980); Markey v. Commissioner, 490 F.2d 1249, 1252 (6th Cir. 1974). *See also* Foote v. Commissioner, 67 T.C. 1, 3-4 (1976); Kroll v. Commissioner, 49 T.C. 557, 561-65 (1968); Green v. Commissioner, 35 T.C. 764 (1961), *aff'd,* 298 F.2d 890 (6th Cir. 1962); Sherman v. Commissioner, 16 T.C. 332 (1951), *acq.,* 1951-2 C.B. 4.
54. Puckett v. Commissioner, 56 T.C. 1092 (1971), *acq.,* 1971-2 C.B. 3; Brown v. Commissioner, 13 B.T.A. 832 (1928), *acq.,* VIII - 1 C.B. 6 (1929).
55. Sapson v. Commissioner, 49 T.C. 636 (1968), *acq.,* 1973-2 C.B. 3 (company headquarters in San Antonio considered salesman's tax home where he paid $50

dence.[56] Travel deductions have been denied completely, however, in cases where the taxpayer had no established "home," defined either as residence or business, from which to be away.[57]

IV. *DALY v. COMMISSIONER*: TAX COURT AND FOURTH CIRCUIT HOLDINGS

A. Tax Court Treatment

Sustaining the Commissioner's ruling, the tax court determined that Daly's traveling expense deductions must be disallowed.[58] The court summarized the purpose of the "away from home" deduction as mitigating the burden of the taxpayer who must incur duplicate living expenses because of the exigencies of his or her business. With this in mind, the court sought to determine whether Daly's duplicate living expenses resulted from the needs of his employer or from his personal desire to maintain a residence in Virginia.[59] The court concluded that the petitioner had only personal reasons for maintaining his residence completely outside of his sales territory and that the additional travel and living expenses incurred were "unnecessary and inappropriate" to his employer's business.[60]

Considering Philadelphia as Daly's place of business, although he maintained no base of operations there, the court concluded that Daly

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month for a room there); Smith v. Commissioner, 2 T.C.M. (CCH) 837, T.C.M. (P-H) ¶ 43,438 (1943)(taxpayer without permanent residence could deduct travel expenses while away from company office which was his business headquarters).

56. Dean v. Commissioner, 54 T.C. 663 (1970), *acq.*, 1970-2 C.B. XIX. The taxpayer must be able to substantiate a permanent residence by showing sums expended for continuing living expenses. Rev. Rul. 73-529, 1973-2 C.B. 37. *See also* Rambo v. Commissioner, 69 T.C. 920 (1978), *acq. in result,* 1979-2 C.B. 2; Brenner v. Commissioner, 26 T.C.M. (CCH) 1210, T.C.M. (P-H) ¶ 67,239 (1967). *But cf.* Hicks v. Commissioner, 47 T.C. 71 (1966) (spending 2 weeks and $100 at parents' residence was insufficient to establish a tax home there).

57. Duncan v. Commissioner, 17 B.T.A. 1088 (1929), *aff'd per curiam,* 47 F.2d 1082 (2d Cir. 1931). One of the first salesmen to be denied travel deductions based on the tax home doctrine was Charles Duncan. Duncan worked on a roving commission basis and paid his own expenses. He claimed residence at a hotel in Buffalo, New York, where he occasionally rented a room, and paid his income taxes from that state. He had no fixed business headquarters. His wife would join Duncan in Buffalo from time to time but spent most of the year in a health spa in Missouri. The court disallowed Duncan's deductions for transportation, meals and lodging, indicating that a traveling salesman cannot be "away from home" unless he maintained a permanent headquarters, either in a business or residential sense. *Id.* at 1091. *See also* Rosenspan v. United States, 438 F.2d 905 (2d Cir.), *cert. denied,* 404 U.S. 864 (1971). *But cf.* Gustafson v. Commissioner, 3 T.C. 998 (1944), *non-acq.,* 1973-2 C.B. 4 (similar fact situation but tax home deemed to be place of residence).

58. Daly v. Commissioner, 72 T.C. 190 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).

59. *Id.* at 195.

60. *Id. See also* Hantzis v. Commissioner, 638 F.2d 248 (1st Cir. 1981) (law student, pursuing summer employment away from Boston, where she usually resided, was not away from home for the purpose of travel deductions because she had no

was not "away from home" when he was in the vicinity of that city and that travel expenses, including food and lodging on overnight trips, would not have been necessary if Philadelphia, rather than McLean, were used as a point of departure.[61] Furthermore, Daly's stated reason for maintaining his residence in McLean was to allow his wife to keep her Washington, D.C. job and to avoid the inconvenience of relocating.[62] These reasons were unrelated to the business of the Myrtle Desk Company, making the travel expenses personal and nondeductible.[63] Additionally, the court dismissed the petitioner's reliance on a revenue ruling dealing with traveling salesmen since there was no contention under the instant facts that Daly was an itinerant in constant travel status.[64]

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business connection to Boston; her reasons for maintaining a residence there were personal).

The tax court reached its conclusion as to Daly by analyzing the location and frequency of the 134 trips he made during the tax year in question. Daly visited Philadelphia, at a distance of 133 miles from McLean, 17 times, more often than any other city. Daly v. Commissioner, 72 T.C. 190, 191-92 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc). A total of 28 cities were visited on a minimum of two occasions. (This included five trips to Chicago and three to company headquarters in North Carolina. The Commissioner conceded deductibility of expenses for these trips so they will not be included in further discussion. *Id.* at nn. 2 & 3). The tax court noted that the record did not indicate the duration of the visits to the 28 cities, but Daly's weekly stay in his territory was for two nights. *Id.* at 192 n.1. Computing the aggregate distance between McLean and the cities within Daly's tri-state territory at 3,744 miles, the court found the distance between Philadelphia and the same cities to be only 1,518 miles. *Id.* at 193. These figures do not reflect the number of trips to each location which would make the disparity in mileage even greater. In seeking to determine the petitioner's principal place of employment, the court observed the high percentage of trips to locations in or around Philadelphia. Of 126 trips to the sales territory, 44% were within 28 miles of the metropolitan Philadelphia area, 66% were within 54 miles of Philadelphia and 80% were within 88 miles of Philadelphia. In contrast, only 7 out of 126 sales trips - 6% - were to locations within 85 miles of McLean. *Id.* at 195-96. It was noted that Daly performed job-related work on 72 occasions at his McLean residence during 1975, although he was not required by his employer to maintain an office at any location. *Id.* at 193. Relying on Daly's own testimony that selling is 85% of the job, the court found the fact that 15% of the non-sales related work was performed in what it labeled the "so-called" office in McLean was of little consequence. *Id.* at 196. Philadelphia was, therefore, characterized as the center of the petitioner's commission-producing activities. *Id. See generally* Markey v. Commissioner, 490 F.2d 1249 (6th Cir. 1969); Wills v. Commissioner, 411 F.2d 537 (9th Cir. 1969); Green v. Commissioner, 298 F.2d 890 (6th Cir. 1962); Gardin v. Commissioner, 64 T.C. 1079 (1975).

61. Daly v. Commissioner, 72 T.C. 190, 195 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).

62. *Id.* at 194.

63. *See, e.g.,* Mazzotta v. Commissioner, 465 F.2d 1399 (2d Cir. 1972); Smith v. Warren, 388 F.2d 671, 673 (9th Cir. 1968).

64. Daly v. Commissioner, 72 T.C. 190, 197 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc). Daly was relying on Rev. Rul. 73-529, 1973-2 C.B. 37.

B. Fourth Circuit Panel Treatment

On appeal by the taxpayers, the Court of Appeals for the Fourth Circuit found the tax court's decision to be erroneous. The panel reversed for the reason that Daly did not have a principal place of business or a tax home in Philadelphia since he maintained no means of conducting his business in that geographic area.[65] The appellate court distinguished *Daly* from other cases cited by the Commissioner in that all other taxpayers maintained a residence in one city and an office or place of business in another.[66] The court of appeals relied principally on a 1960 Nebraska district court opinion, *Schreiner v. McCrory,*[67] which criticized *Flowers* as imposing, contrary to the intent of Congress, a penalty on salespersons who travel in pursuit of their employer's business. The Fourth Circuit held that the concentration of Daly's income-producing activity was, by itself, insufficient to establish Philadelphia as a principal place of business for purposes of section 162(a)(2). In the absence of a principal place of business, Daly became entitled to designate his residence in Virginia as his tax home.[68] The court of appeals dismissed, in a footnoted sentence, the fact that Schreiner's residence was within his sales territory while Daly's was not.[69] The appellate court concluded that the distinction was unimportant since the Commissioner was looking specifically at the site of the concentration of income-producing activity within the territory and nothing more.

Circuit Judge Sprouse dissented, pointing out that the Fourth Circuit had consistently construed "tax home" by reference to the general locus of the taxpayer's place of employment.[70] The dissent stated that the fact that Daly's principal place of business could not be defined by a fixed office site should not have eliminated the critical inquiry into the reason for the travel expenses. Thus, Judge Sprouse would have denied the deduction under the third condition of the *Flowers'* test, as

65. Daly v. Commissioner, 631 F.2d 351, 353 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).

66. *Id.* at 353. *See, e.g.,* Commissioner v. Flowers, 326 U.S. 465 (1946) (business in Mobile, Ala. and residence in Jackson, Miss.); Green v. Commissioner, 298 F.2d 890, 891 (6th Cir. 1962)(residence and home office in Greenville, Ohio and answering service and mail delivery in Dayton, Ohio).

67. 186 F. Supp. 819 (D. Neb. 1960). Schreiner was a salesman assigned to a five state territory in which he sold insurance. The Commissioner contended that Denver, Colo. was Schreiner's tax home since it was the center of his income-producing activities, although, like Daly, the salesman maintained no office or similar place of business there. The Nebraska district court disagreed with the Commissioner and found Omaha, Neb., Schreiner's residence, to be his tax home. *Id.* at 823.

68. Daly v. Commissioner, 631 F.2d 351, 354 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).

69. *Id.* at 353 n.3.

70. *Id.* at 355 (Sprouse, J., dissenting). *See, e.g.,* Babeaux v. Commissioner, 601 F.2d 730 (4th Cir.), *cert. denied sub nom.* Waldrop v. Commissioner, 444 U.S. 993 (1979); Commissioner v. Peurifoy, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam,* 358 U.S. 59 (1958); Barnhill v. Commissioner, 148 F.2d 913 (4th Cir. 1945).

an expense motivated by personal preference rather than business exigency. He argued that Congress did not intend to subsidize the life style of a taxpayer who, for example, resides in the Caribbean and travels to his sales territory in the northeast simply because he does not have a place of business at a fixed location.[71]

C. *En Banc Treatment*

On petition of the Commissioner from the divided opinion of the court of appeals, the case was reheard by the court sitting en banc. The judgment of the appellate court was reversed, disallowing Daly's transportation expenses between McLean and Philadelphia, and meals and lodging while in the Philadelphia area.[72] The nine member en banc court concluded that these expenses were incurred for personal reasons and, citing *Flowers,* that they were unnecessary to the conduct of the employer's business.[73]

A concurring opinion to the en banc decision raised an interesting policy consideration as to dual-wage earner situations involving couples such as the Dalys. Judge Murnaghan called for congressional, rather than judicial, determination of the role one working spouse's situation should play in locating the other spouse's tax home.[74] He felt the Dalys were caught in an inequitable position in that Mrs. Daly's employment justified maintaining the family residence in the Washington area as much as her husband's employment would have justified a move to Philadelphia. While no solution was tendered, Judge Murnaghan urged that such taxpayers be allowed to approach tax issues on a partnership or joint venture basis.[75]

V. ANALYSIS

A. *Locating the Tax Home*

Daly seems to have been logically settled by the Fourth Circuit en banc relying on the traditional tax home analysis of *Flowers,* disallowing travel expenses which were incurred for personal and nonbusiness

71. Daly v. Commissioner, 631 F.2d 351, 355 (4th Cir. 1980)(Sprouse, J., dissenting), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc). *See also* Bunevith v. Commissioner, 52 T.C. 837, *aff'd by unpublished order,* 25 A.F.T.R.2d (P-H) 935 (1st Cir. 1970)(school lunch official could not deduct travel expenses from residence outside of assigned work area even though he had no fixed station within assigned area); Gilberg v. Commissioner, 55 T.C. 611 (1971)(defense department field auditor disallowed transportation expenses from home outside assigned region to job sites within region).

72. Daly v. Commissioner, 662 F.2d 253 (4th Cir. 1981)(en banc).

73. *Id.* at 255. In addition to being bound by the *Flowers* precedent, the en banc opinion noted that the court was bound by *stare decisis* of the Court of Appeals for the Fourth Circuit. *See* note 71 and accompanying text *supra*. It is interesting to note that Judge Sprouse, who wrote the reversing opinion for the en banc decision, raised the *stare decisis* issue in his earlier dissent to the panel opinion.

74. Daly v. Commissioner, 662 F.2d 253, 255-56 (4th Cir. 1981)(en banc)(Murnaghan, J., concurring).

75. *Id.*

related reasons.[76] The *Daly* opinions do, however, point to the confusion inherent in treating a place of business as a home for tax purposes. Although the tax court and the Fourth Circuit had no reason to provide guidance for outside salespersons beyond what was necessary to decide this case, the arbitrary method used to designate Daly's "center of income-producing activities" confuses an already fictionalized concept. The difficulty exhibited by the courts in construing the "away from home" requirement of section 162 supports the suggestion that the time has come for Congress to address policy questions critical to commercial travelers like Daly.[77]

Daly maintained no office or otherwise identifiable base of operations within his tri-state territory. In cases of multiple business locations, the analysis of "away from home" deductions requires that the principal place of business be distinguished from other minor posts of duty.[78] Yet, in characterizing Philadelphia as the center of Daly's commission-producing activities, none of the courts reviewing this case relied on the traditional factors such as the amount of time spent, business activity, or financial return at each location.[79] The tax court noted that the record did not disclose facts such as the amount of income derived from the various cities within the territory nor the amount of time spent at alternate locations.[80] In characterizing Philadelphia as Daly's tax home, the tax court seemed to base its decision on the frequency of trips to that metropolitan area.[81] Without looking to additional factors, the tax court's holding is far from persuasive since only sixty-six percent of Daly's trips were to within fifty-four miles of Philadelphia.

Since Philadelphia was determined as the center of Daly's business activities, meal and lodging expenses would be disallowed while in the Philadelphia "area" or to the extent they would not have been incurred using that city as a point of departure.[82] However, in order to compute "away from home" deductions, it is necessary to know where the tax home ends and the deductible area begins. Surprisingly, neither the Commissioner nor the courts have established a fixed radius from the principal place of business within which no travel expenses are deductible. Unlike some determinations which need to be considered in light of particular circumstances, the radius of the tax home area should be

76. *See* text accompanying note 32 *supra*.
77. *See* text accompanying note 75 *supra*.
78. *See* text accompanying notes 49-51 *supra*. It is doubtful that Daly would be regarded as having no principal place of business since he had been assigned to the same territory for over 10 years. Daly v. Commissioner, 72 T.C. 190, 191 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).
79. *See* text accompanying notes 52-53.
80. Daly v. Commissioner, 72 T.C. 190, 192 n.1 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).
81. *See* note 60 *supra*.
82. Daly v. Commissioner, 72 T.C. 190, 196-97 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc).

fixed and applied equally to all taxpayers.[83]

The tax court and the Fourth Circuit en banc were obviously reluctant to bring Daly under one of the exceptions to the tax home rule, fearing, perhaps, a flotilla of Caribbean commuters. It was unnecessary, however, to strain the principal place of business analysis by designating Philadelphia as Daly's tax home. The courts could have followed precedent in holding that when the time spent at multiple business locations is substantially equal, the tax home is the business location closest to the taxpayer's residence.[84] For a taxpayer such as Daly, or even the ficticious Caribbean commuter, ordinary commuting expenses incurred as a result of a personal decision to live outside the territory would be nondeductible,[85] but the tax home would remain at the business location within the territory closest to the salesperson's residence. The advantage to Daly and his colleagues, as well as to those responsible for the administration of the tax laws, would be that commuting expenses would end and travel expenses begin at a fixed point rather than at an ever-shifting and ill-defined "home," with tax results being essentially the same.[86]

B. The Effect on Working Couples

There is a policy consideration in *Daly* regarding the role one spouse's legitimate employment considerations should play in determining where the other spouse's tax home will be. The problem arises because of two conflicting assumptions made by the federal tax laws concerning work and marriage. *Barnhill v. Commissioner*[87] is often cited for the fundamental belief inherent in our system of taxation that

83. It would appear that a 50 mile radius from the tax home would be in line with other governmental policies allowing per diem expenses for federal and contractual employees away from home on temporary assignments. Hudson v. Commissioner, 34 T.C.M. (CCH) 1462, T.C.M. (P-H) ¶ 75,336 (1975).

84. *See* text accompanying note 54 *supra*.

85. *See, e.g.,* notes 68 and 72 and accompanying text *supra*.

86. For example, Hanover, Pennsylvania is the site within Daly's territory closest to McLean, 80 miles away. Assuming the tax home radius for all taxpayers to be fixed at 50 miles, Daly would have to drive 30 commuting miles from his residence in McLean before entering his tax home radius. Daly's nondeductible mileage would include the 50 mile radius of his tax home plus the 30 miles he would have to drive to get there, totalling 80 nondeductible miles. Expenses incurred traveling in excess of 80 miles from Daly's residence would therefore be deductible as being "away from home." On a sales trip to Philadelphia, at a distance of 133 miles from McLean, Daly would be able to deduct 53 miles as a transportation expense, as well as overnight meals and lodging if required. The tax court computed the aggregate number of miles from Philadelphia to all of the cities visited during the tax year in question as 1,518. Daly v. Commissioner, 72 T.C. 190, 193 (1979), *rev'd*, 631 F.2d 351 (4th Cir. 1980), *rev'd*, 662 F.2d 253 (4th Cir. 1981) (en banc). The aggregate distance from McLean, deducting 80 commuting miles from each trip, is 1,576 miles. The tax consequences remain virtually unchanged while enhanced administration is assured using the fixed tax home radius concept.

87. 148 F.2d 913, 917 (4th Cir. 1945).

a business person will live in reasonable proximity to his place of employment. It has also been stated that our tax laws have developed on the assumption of a common marital domicile, with employment concerns resolved accordingly.[88] Thus, the system assumes a husband and wife will live together and near their source of income. Obviously, with the advent of the two wage-earner family, a "tax unit"[89] must make a less than voluntary choice of locating the abode at a reasonable distance from both tax homes.

Writers have suggested alternatives to the tax treatment of working couples like the Dalys. The Internal Revenue Service has been urged to adopt a tax home rule based on the principal place of residence, rather than the principal place of business,[90] or to adapt the regular/minor post of employment rule to a working husband and wife.[91] It has also been suggested that the Internal Revenue Service expand the temporary employment exception to allow working couples reasonable time to obtain more conveniently situated employment or to relocate the residence.[92] The courts, however, have consistently held that a husband and wife each have a separate tax home at his or her principal place of business. [93] While recognizing the burden of added commuting expenses imposed on working couples, the tax court continues to find the nature of the expenditures to be personal and therefore

88. Chwalow v. Commissioner, 470 F.2d 475 (3d Cir. 1972).

89. *Tax unit* is a term used to describe a husband and wife filing jointly. *Tax Incentive Act of 1981: Report of the Committee on Ways and Means,* H.R. REP. NO. 4242, 97th Cong., 1st Sess. 52 (1981).

90. Milton, Logan & Tallant, *The Traveling Taxpayer: A Rational Framework for his Deductions,* 29 U. FLA. L. REV. 119, 141 (1976).

91. Popkin, *Deduction of Traveling Expenses by the Two-Worker Family - An Inquiry into the Role of the Courts in Interpreting the Federal Tax Law,* 55 TEX. L. REV. 645, 659-60 (1977).

92. Dobbs, Daly v. Commissioner: *Effect of the Tax Home Rule Under Section 162 on Two-Earner Families,* 34 TAX LAWYER 829, 843 (1981). A taxpayer who works at a temporary place of employment at a distance from his residence may be considered "away from home" for purposes of section 162(a)(2). Commissioner v. Peurifoy, 254 F.2d 483 (4th Cir. 1957). Employment is temporary if it can be expected to last for only a short period of time. Tucker v. Commissioner, 55 T.C. 783, 786 (1971). There have been cases where salespersons who had assigned territories but worked in each location within the territory on a roving basis were held to come under the "temporary" exception to the tax home rule. Schreiner v. McCrory, 186 F. Supp. 819 (D. Neb. 1960); Sapson v. Commissioner, 49 T.C. 636 (1968), *acq.,* 1973-2 C.B. 3; Gustafson v. Commissioner, 3 T.C. 998 (1944), *non-acq.,* 1973-2 C.B. 4. The failure of the court of appeals to consider the temporary nature of Daly's employment is partially the result of a procedural deficiency. The petitioner did not raise this argument until appeal, thus precluding consideration of the issue. Brief for Appellant at 14, Daly v. Commissioner, 631 F.2d 351 (4th Cir. 1980).

93. Coerver v. Commissioner, 297 F.2d 837 (3d Cir. 1962)(per curiam)(filing of joint return did not create taxable unit with only one tax home); Hammond v. Commissioner, 213 F.2d 43, 44 (5th Cir. 1954) (husband and wife do not constitute a partnership for tax home purposes).

nondeductible.[94]

VI. CONCLUSION

Daly v. Commissioner[95] stands as an example of the confusion inherent in treating a place of business as a home for tax purposes, particularly when the taxpayer is a commercial traveler. Although this case could have been readily decided on the basis of personal expense exclusions, the arbitrary method used to find Daly's center of commission-producing activities expands the already fictionalized concept of a tax home. Until the inequities of the tax laws are corrected by Congress, the burden on traveling salespersons and their spouses would be lessened by guidance from the Commissioner or the courts as to where or how a nontraditional tax home will be located for purposes of computing "away from home" deductions. A simple solution would be to allow a traveling salesperson to consider his or her tax home as the business location closest to the residence, when there is no other way to distinguish the principal place of business activity. A traveling taxpayer and spouse cannot make a reasonable determination of where to locate their abode or office until they know where their tax home is apt to be assigned by the tax laws.

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94. Foote v. Commissioner, 67 T.C. 1, 6 (1976). The concurrence to the en banc *Daly* opinion called for comprehensive congressional action to remedy this inequity. Daly v. Commissioner, 662 F.2d 253, 255-56 (4th Cir. 1981) (en banc) (Murnaghan, J., concurring). Congress did recently consider the "marriage penalty" in the Economic Recovery Tax Act of 1981, ch. 4, § 103, 95 Stat. 172, and noted that in addition to being taxed at a higher rate, two-wage earner couples have more expenses, such as added transportation costs. *Tax Incentive Act of 1981: Report of the Committee on Finance,* S. REP. NO. 97-144, 97th Cong., 1st Sess. 29-30 (1981). Congressional response has been to allow married couples a new deduction equal to a percentage of the earnings of the spouse with the lower income. I.R.C. § 221 (1981). Congress sees this as a major step towards its goal of eliminating the marriage penalty entirely, but has declined to act regarding the penalties imposed by the traditional tax home concept.

95. 662 F.2d 253 (4th Cir. 1981) (en banc).