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Highway Robbery: State Troopers Denied Exclusion Under § 119—*Commissioner v. Kowalski*

Since the enactment of section 119¹ of the Internal Revenue Code of 1954, there has been considerable commentary² concerning its interpretation in relation to the "convenience of the employer" doctrine. Of particular difficulty has been the application of the section to state troopers. This has fostered a split among the Courts of Appeals³ as to whether cash disbursements for meals qualifies for an exclusion from gross income under section

1. I.R.C. § 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 employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

2. *E.g.*, Hill, *Exclusions for Meals and Lodging Can Make Sizable Addition to Shareholder Income*, 7 TAX. FOR ACCOUNTANTS 244 (1971); McSpadden, *Internal Revenue: Interpretation of "Business Premises of the Employer"* 24 OKLA. L. REV. 86 (1971); Walker, *Employee Meals, Lodging and Moving Expenses*, 25 N.Y.U. TAX INST. 529 (1967); Note, 18 SYRACUSE L. REV. 138 (1966); Note, 1965 DUKE L.J. 165; Gutkin and Beck, *Some Problems in Convenience of the Employer* 36 TAXES 153 (1958); McDermott, *Meals and Lodging Under the 1954 Code*, 53 MICH. L. REV. 871 (1955).

3. *United States v. Keeton*, 383 F.2d 429 (10th Cir. 1967); *United States v.*

614 through the application of section 119.

This question was resolved in *Commissioner v. Kowalski*.⁵ In that case the United States Supreme Court held that cash meal allowances to state troopers constitutes gross income and that the exclusion provided by section 119 covers meals, but not cash reimbursements for meals.

Robert J. Kowalski, a state trooper for the State of New Jersey, received, in addition to his salary, an amount designated for meals taken presumably while on duty. The meal allowance was paid in advance, on a bi-weekly basis and was separately stated with his salary. The meal allowance was also separately accounted for in the state's police accounting system. There were no restrictions placed on the use of the cash disbursement and the troopers were not required to account for their meal expenses. In addition, although the allowance was reduced during periods covering the troopers' military leave, there was no other reduction in the allowance made for periods when a state trooper was not on patrol. The brochure for recruitment describes the cash allowance as an item received in addition to the base salary. The amount of the allowance varied with an officer's rank and was included in his gross pay for purposes of calculating pension benefits.⁶

The case originated in the Tax Court⁷ and in a split, en banc decision that court determined that the meal allowance must be included in his income under section 61 of the Internal Revenue Code of 1954 and was not excludable under section 119 because

Morelan, 356 F.2d 199 (8th Cir. 1966); *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963); All held the cash allowances to qualify for an exclusion under section 119.

The following Circuit Courts held in their respective cases that the cash allowance for state troopers did not come under section 119 and was taxable income: *Wilson v. United States*, 412 F.2d 694 (1st Cir. 1969); *Magness v. Commissioner*, 247 F.2d 740 (5th Cir. 1957). It should be noted that the *Magness* and *United States v. Barrett* cases were both decided in the Fifth Circuit, but with contrary results. This inconsistency was a result of the distinguishing facts of the two cases. In *Magness* the patrolmen were paid \$4.50 per day for meals which did not have to be accounted for as actually having been spent on meals. This amount was paid regardless of whether they were on duty or not. In *Barrett*, in order to receive reimbursement, the patrolmen had to submit an expense account which showed the sum spent per day on each meal. The Fifth Circuit upheld an exclusion in *Barrett* because it required more accountability for the funds than in *Magness*. 321 F.2d at 913.

4. I.R.C. § 61 Gross Income Defined.

(a) General Definition - "Except as otherwise provided in this subtitle, Gross Income means all income from whatever source derived. . ."

5. 434 U.S. 77 (1977).

6. For an extremely detailed account of the facts, see the Tax Court's opinion, in *Commissioner v. Kowalski*, 65 T.C. 44 (1975).

7. *Id.*

the reimbursement was paid to the troopers in cash.⁸

The Third Circuit,⁹ reversing the Tax Court, held that the allowance given to state troopers to eat meals within the assigned patrol areas was excludable from gross income. That court relied primarily on its prior decisions in *Saunders v. Commissioner*¹⁰ and *Jacobs v. United States*.¹¹

HISTORICAL PERSPECTIVE

A number of administrative rulings and case law predate the enactment of section 119. *Hyslope v. Commissioner*¹² was the initial case dealing with state trooper meal allowances prior to the enactment of the 1954 code. In that case the Tax Court denied any exclusion for a meal allowance that was allotted in addition to a trooper's regular salary. The Tax Court's rationale was that the state trooper was "in no essentially different position from the worker who is unable to have one of his meals at home."¹³ The taxpayer relied upon *Jones v. United States*¹⁴ which allowed an exclusion from gross income of military personnel for the cash allowance designated for subsistence and quarters. This was rejected by the Tax Court, which relied on its prior decision in *Gunnar Van Rosen v. Commissioner*,¹⁵ limiting the ruling of *Jones* to military personnel.

8. The Tax Court did rule in favor of Kowalski on the application of section 162(a)(2) of the Internal Revenue Code of 1954 to his overnight trips. See 434 U.S. at 81 n.10.

9. 544 F.2d 686 (3rd Cir. 1976).

10. 215 F.2d 768 (3rd Cir. 1954). In this case the sole issue before the Court was whether a cash payment of \$665 for meals during the taxable year of 1950 could be excluded from gross income. The Third Circuit reversed the Tax Court's finding that such payment should be included in gross income and thus allowed the exclusion. See text beginning at note 17 *infra*, for a discussion of the rationale of the Court's decision.

11. 493 F.2d 1294 (3rd Cir. 1974). The Court held that the special responsibilities of a director of an institute for mentally retarded persons requiring him to be there on a 24 hour basis were such that groceries provided him by his employer were meals within the meaning of section 119 and thus excludable from his gross income. The Court analogized the situation to "state trooper" cases and stated: "If the furnishing of cash allowances is properly excludable under sec. 119 then the furnishing of groceries, under the facts of this case, should be excludable also." 493 F.2d at 1297 n.7.

12. 21 T.C. 131 (1953).

13. *Id.* at 134.

14. 60 Ct. Cl. 552 (1925).

15. 17 T.C. 834 (1951).

Hyslope was followed shortly by *Saunders v. Commissioner*,¹⁶ one of the main cases relied upon by the Third Circuit in their decision in *Kowalski*. In its reversal of the Tax Court's finding that no exclusion was warranted, the Third Circuit reasoned that the funds were supplied for the "convenience of the employer" (the State of New Jersey), since substantially better police protection was provided by allowing the troopers to stay on their designated routes rather than returning to a meal station.¹⁷

The Court distinguished *Hyslope* on the basis that the taxpayer in that case was not required to submit to the rigid system of control that was laid down in the New Jersey scheme. In the alternative, the Court stated that they did not consider *Hyslope* of any great weight in light of *Jones v. United States*.¹⁸

It should be noted that both of these cases were docketed at the same time before the Tax Court and had *Saunders* been decided first, it is possible to speculate that subsequent developments in the area may have been quite different.¹⁹

The final case to be decided without the benefit of the 1954 Code was *Magness v. Commissioner*.²⁰ In that case an exclusion from gross income for cash allowances was denied. It was the opinion of the Fifth Circuit that this case was "probably distinguishable"²¹ from *Saunders*. In fact, it is reasonable to assume that had *Saunders* been decided in the Fifth Circuit, the result would have been the same. Essentially, the New Jersey system in *Saunders* required more accountability as to the manner in which the allowance was spent, and it was not directly referred to as compensation.

The Supreme Court in *Kowalski* did not limit itself to a discussion of these cases, but proceeded with a detailed historical analysis of the "convenience of the employer" doctrine and section 119.

Justice Brennan, writing for the majority, first addressed the taxpayer's argument that notwithstanding section 119, a line of administrative rulings and lower court cases provided that benefits conferred by an employer, for the convenience of the em-

16. 215 F.2d 768 (3rd Cir. 1954) See note 10 *supra*.

17. *Id.* at 770.

18. *Id.* at 775.

19. Gutkin and Beck, *Some Problems in Convenience of the Employer* 36 TAXES 153, 156 (1958).

20. See note 3 *supra*.

21. The Fifth Circuit found the distinguishing characteristics to be: (1) that in *Saunders* the cash allowance was not intended as reimbursement, while in *Magness* it was found to be part of the salary; (2) in *Saunders* the \$70 per month was given to pay for meals while actually on patrol. In *Magness* the \$4.50 per day allowance was paid whether the officer was on duty or on vacation. 247 F.2d at 743-44.

ployer and not as compensation, were not income under the Internal Revenue Code of 1954.²²

The taxpayer's argument focused on *Jones v. United States*²³ and O.D. 514²⁴; that held cash reimbursements were not to be considered income. O.D. 514, an administrative decision, held that "supper money"²⁵ was not includable in gross income. It was the Court's view that the exclusion provided for by the above rulings rested merely on the employer's characterization of the payment.²⁶ However, it is equally clear that O.D. 514 provides that an employee must perform extraordinary services before this characterization is valid.

The Court, in an attempt to distinguish O.D. 514, relied upon three subsequent rulings: O.D. 915,²⁷ O.D. 814²⁸, and Mimeograph 5023.²⁹ Although the Court correctly stated that these rulings require that the actions of the employee benefit the employer, this

22. 434 U.S. at 83.

23. 60 Ct. Cl. 552 (1925).

24. 2 C.B. 90 (1920).

25. 'Supper money' paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee. *Id.*

26. 434 U.S. 77, 88 (1977).

27. 4 C.B. 85 (1921). This section held that:

Where the employees of a hospital are subject to immediate service on demand at any time during the twenty-four hours of the day and on that account are required to accept quarters and meals at the hospital, the value of such quarters and meals may be considered as being furnished for the convenience of the hospital and does not represent additional compensation to the employees. . . .

28. 4 C.B. 84-5 (1921).

Where, from the location and nature of the work, it is necessary that employees engaged in fishing and camping be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and need not, therefore, be included in computing net income of the employees.

29. 1940-1 C.B. 14-15.

If a person received as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person or the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters on meals are furnished to the employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees.

The interpretation of "convenience of the employer" was found to be where an employee was required to accept such quarters and meals in order to properly perform his duties.

is also true of O.D. 514. As to the characterization of the payment given by the employer, not only O.D. 514 has such an inference. A comparison of O.D. 514 with O.D. 915 and O.D. 814 clearly reveals that there is little difference in the language of all three since the first sentence of each requires some service to be performed. Consistency can, therefore, be seen in all three rulings in that the benefit can be "considered" for the convenience of the employer.

Perhaps the underlying reason for distinguishing O.D. 514 lies in the fact that it is a troublesome ruling for the Court to explain in arriving at their cash-in kind distinction later in the opinion because this ruling involved cash allowances, while the others did not.

It is also interesting to note that O.D. 514 was the only prior ruling on the "convenience of the employer" doctrine which managed to survive Mimeograph 6472.³⁰ Mimeograph 6472 held that the convenience of the employer rule was only an administrative test which should not be applied when it is apparent that the benefits received from an employer were compensation. This ruling indicated that the doctrine is only to be applied when the compensatory character of such benefits is not otherwise determinable.³¹

Turning to the case law in the area, the Court relied primarily on *Van Rosen v. Commissioner*³² and stated that *Van Rosen* rejected the *Jones v. United States* holding as to cash allowances and as to any indication that tax consequences turn on the intentions of the employer. Further, the Court stated that by implication, *Van Rosen* also overruled O.D. 514 and its supposed employer characterization theory.³³ In actuality, it appears that the Court conveniently eliminated the two authorities that sanctioned cash reimbursements by declaring that they were rejected in *Van Rosen* on grounds (employer characterization) that exist in any reimbursement scheme.

Based on this historical overview, the ultimate finding was that the employee, in order to obtain an exclusion, must receive the benefits solely because he could not otherwise perform his duties. This was put in terms of the "business necessity view."³⁴ However, it was left open as to whether the taxpayer in *Kowalski*

30. 1950-1 C.B. 15.

31. *Id.*

32. 17 T.C. 834 (1951). The Court of Claims held that a cash allowance received by a ship master for subsistence and quarters in lieu of actual living quarters being supplied on the ship (docked for purposes of converting to a hospital ship) was not excludable from gross income.

33. 434 U.S. at 93.

34. *Id.*

could have obtained an exclusion under the pre-1954 doctrine as the Court ultimately found that the prior rulings did not survive the enactment of the 1954 Code and section 119.

THE "IN KIND" REQUIREMENT

The primary basis for the Court's decision was that section 119 covered only meals "in kind" and not cash payments of any sort.³⁵ The findings of the "in kind" requirement centered around the interpretation given to the legislative history of section 119 by the House³⁶ and Senate Reports.³⁷

These two congressional bodies originally expressed conflicting views as to how the exclusion for meals and lodging was to be derived. The Court's interpretation³⁸ was that the House had disregarded the "convenience of the employer" doctrine in favor of a test which would require the meals to be furnished at the place of employment, and that the employee must accept them as a condition of his employment.³⁹

The Senate determined that the House provision was "ambiguous"⁴⁰ and, therefore, developed a basic test: "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)."⁴¹ The Senate legislative history (now contained in section 119)⁴² further reveals that a state statute or employment contract shall not be "determinative" as to whether meals or lodging are compensation.⁴³ The last portion of section 119 has been characterized as "puzzling"⁴⁴ by at least one commentator in that it allows the inference that if it were "found that the employer intended compen-

35. 434 U.S. at 83.

36. H.R. REP. NO. 1337, 83d Cong., 2d Sess. 18, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4042.

37. S. REP. NO. 1622, 83d Cong., 2d Sess. 19, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4649.

38. 434 U.S. at 91.

39. H.R. REP. NO. 1337, 83d Cong., 2d Sess. 18, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4042.

40. S. REP. NO. 1622, 83d Cong., 2d Sess. 19, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4649.

41. *Id.*

42. *See* note 1 *supra*.

43. S. REP. NO. 1622, 83d Cong., 2d Sess. 19, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4649.

44. J. CHOMMIE, *THE LAW OF FEDERAL INCOME TAXATION*, 53 (2d ed. 1973).

sation by evidence apart from or in addition to, an employment contract or a State statute, section 119 would not apply.”⁴⁵ This interpretation was rejected in *Boykin v. Commissioner*,⁴⁶ which held that if the provisions of section 119 are complied with, it does not matter that such an allotment may, in fact, have been intended as compensation. This appears to be the better view and is in line with the plain language of the legislative history of section 119.⁴⁷

In light of the above stated authority, the primary concern was not the characterization of the cash allowance as compensation, but whether the New Jersey system violated the apparent “in kind” requirement. The center of the controversy was a portion of the technical appendix of the Senate Report, which states in part: “Section 119 applied only to meals or lodging furnished in kind. Therefore, any meals or lodging received by an employee will continue to be includable in gross income to the extent that such allowances constitute compensation.”⁴⁸

It was Kowalski’s argument, and it is a very persuasive one, that this section of legislative history provides a “negative implication”⁴⁹ that the “technical appendix to the Senate Report creates a class of noncompensatory cash meal payments that are to be excluded from income.”⁵⁰ This was expressly rejected by the Court on the basis that the “obvious intent”⁵¹ of section 119 was to narrow the circumstances allowing for exclusions and that such cash reimbursements had a “presumptively compensatory nature.”⁵²

Justice Brennan explained⁵³ the intent of the statement concerning cash allowances, “to the extent that such allowances con-

45. *Id.*

46. 260 F.2d 249 (8th Cir. 1958).

47. The Senate Report provides in part:

However, in deciding whether they were furnished for the convenience of the employer, the fact that a State statute on an employment contract fixing the terms of the employment indicate the meals or lodging are intended as compensation is not to be determinative. This means that employees of State institutions who are required to live and eat on the premises will not be taxed on the value of the meals and lodging even though the State statute indicated the meals and lodging are part of the employee’s compensation.

S. REP. NO. 1622, 83d Cong., 2d Sess. 19, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4649.

48. S. REP. NO. 1622, 83d Cong., 2d Sess. 190-91, reprinted in [1954] U.S. CODE CONG. & AD. NEWS at 4825.

49. 434 U.S. at 92.

50. *Id.*

51. 434 U.S. at 94.

52. *Id.*

53. 434 U.S. at 95.

stitute compensation",⁵⁴ by stating that it referred to section 162(a)(2),⁵⁵ (allowing reimbursement for certain qualified traveling expenses) which was not to be affected by this ruling. However, the Court stated this in terms of an assumption only,⁵⁶ and therefore should not have summarily dismissed the other reasonable interpretation of the Senate Report's technical appendix.

It has been noted, in support of the interpretation of the statement as being strictly "in kind" that if Congress intended to create section 119 to include cash payments, it could have readily looked to other sections that so provide.⁵⁷ For instance, section 107⁵⁸ provides that the rental value of a home or a cash allowance in lieu thereof, given to a minister, should be excluded from his gross income. Utilizing this comparison, one can argue that if Congress had in mind that cash payments would be excluded from gross income, it would have expressly stated so in section 119.

REPEAL OF SECTION 120

Section 120⁵⁹ had provided that a five dollars per day subsis-

54. See Technical Appendix of the Senate Bill, *supra*, note 48.

55. I.R.C. § 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, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business. . . .

56. 434 U.S. at 94.

57. J. CHOMMIE, *THE LAW OF FEDERAL INCOME TAXATION* 57 (2d ed. 1973).

58. I.R.C. § 107. RENTAL VALUE OF PARSONAGES.

In the case of a minister of the Gospel, gross income does not include—

(1) the rental value of a home furnished to him as a part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

59. I.R.C. § 120. STATUTORY SUBSISTENCE ALLOWANCE RECEIVED BY POLICE.

(a) General Rule—Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official. . . .

(b) Limitations—

(1) Amounts to which subsection (a) applies shall not exceed \$5 per day.

(2) If any individual receives a subsistence allowance to which subsection (a) applies, no deduction shall be allowed under any other provision

tence allowance for state troopers could be excluded from gross income. This was repealed⁶⁰ after four years and the Court, on the basis of the repeal, stated that the taxpayer in *Kowalski* had no basis for an equity argument.⁶¹ The Court cited the House Report which stated that the section provided an inequity because of other individual taxpayers whose jobs require such expenditures were put in a less favorable position than certain police officers.⁶²

However, the Court failed to acknowledge the Senate Report which provides additional insight into the legislative history of the repeal. The Senate Report states that the repeal would provide for an equitable resolution and put all taxpayers on equal footing because police officers, despite the repeal of section 120, can deduct such "expenses in the same manner as other taxpayers who are away from home."⁶³ Sections 119⁶⁴ and 162⁶⁵ were apparently being referred to as alternative means by which a police officer could have the benefit of a deduction. However, with the Supreme Court's decision in *United States v. Correll*,⁶⁶ section 162 was no longer available to state troopers as a means of deducting the daily cost of meals on the job since this deduction was possible only if the troopers were required to stay overnight.

Justice Blackmun,⁶⁷ in his dissent from the majority opinion in *Kowalski*, indicated that he agreed with the dissent in *United States v. Correll*.⁶⁸ It was his opinion that the narrow construction⁶⁹ of section 162 obviously limits the avenues of tax avoidance available to the state troopers, and therefore, the point was not argued by the taxpayer in *Kowalski*.⁷⁰

It seems clear that, in repealing section 120, the legislature did not intend to leave the state troopers without any means of tax

of this chapter for expenses in respect of which he has received such allowance, except to the extent that such expenses exceed the amount excludable under subsection (a) and the excess is otherwise allowable as a deduction under this chapter.

60. *Repealed* 72 Stat. 1607 (1958).

61. 434 U.S. at 95.

62. *Id.* at 96.

63. 3 U.S. CODE CONG. & AD. NEWS 4803 (1958).

64. *See* note 1 *supra*.

65. *See* note 55 *supra*.

66. 389 U.S. 299 (1967). The Supreme Court held in a 5-3 decision (Justice Marshall did not participate) that a traveling salesman could not deduct the cost of morning and noon meals on the road under section 162 because his trips did not require sleep or rest. This involved the so called "sleep or rest," "overnight" rule.

67. Chief Justice Burger joined in the dissent.

68. 389 U.S. at 307. Justice Douglas, joined by Justices Black and Fortas, objected to the words "while away from home" being construed as "overnight" because the statute spoke in terms of geography and not time.

69. 434 U.S. at 97.

70. *Id.*

relief. Unfortunately, the result in *Kowalski* and the limitations put on section 162 by *United States v. Correll* prevent this country's state troopers from enjoying a benefit that they were intended to have. The Senate Report also reveals the concern for lost revenues as a result of the five dollar exclusion. It was estimated that the loss amounted to as much as \$50 million a year.⁷¹

An officer working a basic five day work week, excluding a two week vacation each year, could maximize his deduction under section 120 to the amount of \$1,250.⁷² The amount allowed the New Jersey state troopers was originally \$70 per month⁷³ in 1949. In January, 1970, it culminated in \$1,740⁷⁴ per year for the average trooper. In order for a state trooper in 1970 to get the equivalent of \$1,250 in the mid-fifties, it would require a substantial payment in today's inflated dollar. In the mid-fifties, \$1,250 was an exceptionally large sum of money and the exclusion allowed could be considered quite substantial. It is therefore reasonable to conclude that the five dollar subsistence allowance was a legitimate concern of Congress in terms of lost revenues, and since states across the country were adjusting salaries to take advantage of section 120, the repeal was in order. The five dollar allotment was simply too generous an amount. It was felt that the troopers could get along with a lot less and still be regulated by section 119.

It should not seem coincidental that section 119, embodying the "convenience of the employer" doctrine, and section 120, would appear together in the 1954 Code. Section 120 appears to be the corollary of section 119 and the Congress did not intend, as the Court in *Kowalski* would suggest, that the repeal of section 120 would end any equitable argument⁷⁵ as to Congress' intent concerning some tax relief for state troopers. Clearly Congress intended, and so stated, that the state troopers would have some sort of alternative in light of the repeal of section 120. Much to the disappointment of state troopers all over this country, such an alternative no longer exists.

71. 3 U.S. CODE CONG. & AD. NEWS 4803 (1958). See generally 18 SYRACUSE L. REV. 138 (1966-7).

72. 250 working days per year multiplied by \$5 allowed under section 120.

73. *Commissioner v. Kowalski*, 65 T.C. 44, 46 (1975).

74. 434 U.S. at 79 n.4.

75. *Id.* at 96.

COMPARISON TO THE MILITARY

One of the taxpayer's final arguments in *Kowalski* is that, unlike state troopers, military personnel are allowed such exclusions.⁷⁶ It was the contention that state troopers, serving as the militia of the state, should be afforded such a benefit. There can be no denial of the fact that the state trooper system is akin to the usual military structure, and that the members of each group are subject to similar regulations.

The military comparison was of particular concern to Justice Blackmun in his dissent. It was Justice Blackmun's view that there is no such distinction in the Internal Revenue Code and that there is no real support for such a distinction.⁷⁷ While distinctions are found in the Treasury Regulations⁷⁸ and in general references within the statutes,⁷⁹ he found this to be very "weak support" for allowing the military such an exclusion and denying it to the state troopers.

The majority summarily dismissed the comparison to the military in holding that decisions regarding exclusions and deductions, in order to be administerable, must sometimes be arbitrary.⁸⁰

THE FACTUAL CONTEXT

Through a comparison of *Kowalski* with other cases decided by the Circuit Courts of Appeals,⁸¹ it becomes clear that this case involved the least favorable factual situation for state troopers to be saddled with in front of the Supreme Court of the United States.

The system required minimal accountability as to where the funds were spent or how they were spent. Had *United States v. Barrett*,⁸² which required vouchers in order to account for the meals, been before the Court instead, perhaps the Court would have been less disturbed about cash reimbursements. Also damaging was the fact that no reduction in meal allowance was made

76. *Id.*

77. 434 U.S. at 98.

78. Treas. Reg. §1.61-2(b) (1978) provides that "the value of quarters or subsistence furnished to such persons (military) is to be excluded from gross income."

79. 37 U.S.C. § 101 (Supp. 1978). Definition 25 states as follows:

'Regular compensation' or 'regular military compensation (RMC)' means the total of the following elements that a member of a uniformed service accrues or receives, directly or indirectly, in cash or in kind every payday; basic pay, basic allowance for quarters, basic allowance for subsistence; and federal tax advantage accruing to the aforementioned allowances because they are not subject to federal tax.

80. 434 U.S. at 96.

81. See note 3 *supra*.

82. 321 F.2d 911 (5th Cir. 1963). See also note 3 *supra*.

for periods when the state trooper was not on duty, with the exception of when he was on military leave. This situation can be contrasted with *Barrett*⁸³ and *United States v. Morelan*,⁸⁴ both of which allowed exclusions only for funds spent while on the job.

Two other provisions of the cash allowance system gave the image of compensation: (1) the cash allowance was listed as an item of salary on the recruitment brochure, and (2) the amount received varies with rank. Undoubtedly all of these factors together swayed the Court in its decision. The end result is that state troopers across the country are affected by this decision, even though their systems, some of which provided more restrictions, might possibly have received more favorable treatment from the Court.

POSSIBLE ALTERNATIVE TO KOWALSKI

In light of *Kowalski*, it appears that the only way to come within the confines of this decision and still afford state troopers an exclusion from gross income is to return to the meal station system. Prior to 1949, when the meal allowance system went into effect, troopers had to drive to various state meal stations to eat. This was found to be very ineffective because troopers were required to leave their assigned areas for as long as an hour and a half at a time in order to drive to the station and eat. If circumstances were such that they could not make it to the meal station, they were allowed to eat at a public restaurant and submit a voucher for reimbursement from the state.⁸⁵ Quite obviously, this proved to be very inefficient as areas were left unpatrolled for a considerable amount of time. The alternative was the cash payment method which survived until the decision in the *Kowalski* case.

A new method is needed in order to avoid the inconvenience of meal stations and provide the troopers with the exclusion they deserve. One possible solution is to set up "quasi-meal stations" with public restaurants. On each patrolled route in the state, certain convenient, approved restaurants would be invited to join the program. The troopers, instead of being given cash reimburse-

83. *Id.*

84. 356 F.2d 199 (8th Cir. 1966). Patrolmen were given a statutorily fixed salary as well as a \$3.00 per working day subsistence allowance. It was to be used only for meals while on duty and other incidental expenses.

85. 65 T.C. at 46.

ment for amounts spent on meals, would take their meals at the restaurant and have the cost charged to the state on a special account between the state and the restaurant. No cash would ever pass to the state troopers for meals, and most importantly, the meals would be received "in kind."

The state could set a specific price limit as to what the troopers could charge or have a special meal served to the troopers each day. A meal ticket could be stamped whenever a meal was consumed at a certain restaurant, and these ticket totals could be audited periodically.

This system would be very beneficial and, most important, the troopers would eat in the vicinity of their regular route thereby providing better police protection than when the meal station system was in effect. The system would also furnish the state with a convenient method of accounting in determining the amount spent on meals. Another convenience factor is that the restaurant would be more prepared to meet the needs of the troopers and their department since the troopers would be expected daily and meals could be prepared in advance to enable the trooper to eat and return to the job. Of course, the program would also provide a means of enhancing public relations with the restaurants and the public by patronizing them on a regular basis. Restaurants should be willing to participate because they would be assured of regular customers. Finally, under this system, the state troopers would qualify for an exclusion from gross income for the amount spent on the meal.

CONCLUSION

It is undoubtedly true, as Justice Blackmun concluded in his dissent, that state troopers, who are not well paid, will not understand the Supreme Court's decision in this case.⁸⁶ The decision is also damaging in that states that wish to provide such benefits to the troopers are stuck on the horns of a dilemma. The states can either maintain the situation in status quo in light of this decision or compensate the troopers in another way. The latter alternative would probably involve raising the salaries of the troopers so that they can afford the meals and still be on an economic stance similar to when they had the exclusion under section 119. In order to afford this, taxes within the state may have to be raised. Another alternative is to return to the meal station system. However, this method, as previously discussed, does not provide the needed police protection the public requires.

86. 434 U.S. at 98.

The only other remedies for this situation are to appeal to the legislature for some sort of relief or to circumvent this decision in a fashion similar to the "quasi-meal station" suggestion outlined above. In any event, the state troopers, in light of their difficult work and low salary are entitled to any additional benefits the states can provide and undoubtedly such action will be undertaken.

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