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The Deductibility of Daily Transportation Expenses To and From Distant Temporary Work Sites

Michael D. Rose*

In the Article Professor Rose addresses the uncertainty that has characterized judicial application of Internal Revenue Code provisions to daily transportation expenses to and from distant temporary work sites. Although the Internal Revenue Code disallows deductions for commuting expenses to and from work, transportation expenses between work sites are deductible. The courts have had some difficulty applying these principles to distant temporary work sites. Professor Rose argues that the United States Tax Court in Turner v. Commissioner has fomented much of this confusion. Although the court reached the correct determination on the facts, its rationale is flawed. According to Professor Rose, the temporary/indefinite test that the courts of appeals use is the appropriate standard for deciding whether these expenses are deductible.

I. INTRODUCTION

The expenses of commuting to and from work are not deductible for federal income tax purposes.¹ The rationale for this principle is that taxpayers who live at a distance from their places of work do so for personal reasons.² Taxpayers, however, may deduct

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1. See, e.g., McCabe v. Commissioner, 688 F.2d 102, 105 (2d Cir.), cert. denied, 103 S. Ct. 208 (1982); Kasun v. United States, 671 F.2d 1059, 1061 (7th Cir. 1982).

"[N]o deduction shall be allowed for personal, living, or family expenses." I.R.C. § 262 (1976). The "costs of commuting [to the] place of business or employment are personal expenses." Treas. Reg. § 1.262-1(b)(5), T.D. 7207, 1972-2 C.B. 106, 157. The Code allows "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ." I.R.C. § 162(a) (1976). However, "[c]ommuter expenses are not considered as business expenses and are not deductible." Treas. Reg. § 1.162-2(e) (1958).

2. See, e.g., McCabe v. Commissioner, 688 F.2d at 106; Kasun v. United States, 671 F.2d at 1061.

transportation expenses that they incur going between work sites³ because this type of travel is "motivated by purely business reasons."⁴ Although these principles are well established, their application to daily transportation expenses to and from distant temporary work sites is problematic. Much of the uncertainty surrounding the issue arises from *Turner v. Commissioner*, a case the entire United States Tax Court reviewed.⁵

In *Turner* the Tax Court concluded that taxpayer, a consultant engineer who worked as a temporary employee, could not deduct his transportation expenses for daily trips between his residence and workplaces because the journeys constituted commuting.⁶ On appeal the Commissioner moved to vacate and remand⁷ the case with directions to enter a new decision of no deficiency.⁸ The motion followed the Commissioner's reexamination of his position in *Turner* and his determination not to pursue this position further.⁹ The Court of Appeals for the Second Circuit granted the motion.¹⁰ The sweeping language of Judge Dawson's opinion for the Tax Court arguably prompted the Commissioner's motion. The opinion rejected the notion that the temporary nature of work may make transportation expenses deductible under section 162(a) of the Internal Revenue Code of 1954.¹¹

Before the Second Circuit's order to vacate and remand the case for entry of a decision of no deficiency, the Tax Court had followed *Turner* twice.¹² Then in 1976 when the Tax Court "again faced . . . the troublesome question of how to deal with travel expenses . . . which partake of the character of commuting expenses,"¹³ the court acceded to the parties' framing of the issue "in classical terms"¹⁴—that is, whether taxpayer's employment was

3. See, e.g., *Steinhort v. Commissioner*, 335 F.2d 496, 504 (5th Cir. 1964).

4. *Curphey v. Commissioner*, 73 T.C. 766, 778 (1980), *appeal dismissed*, No. 80-7678 (9th Cir. Feb. 22, 1982).

5. 56 T.C. 27 (1971).

6. *Id.* at 33.

7. Appellee's Motion to Vacate Decision of Tax Court, *Turner v. Commissioner*, No. 71-1926 (2d Cir. Feb. 28, 1972).

8. *Id.* at 2.

9. *Id.*

10. Order Granting Appellee's Motion to Vacate and Remand, *Turner v. Commissioner*, No. 71-1926 (2d Cir. Mar. 21, 1972).

11. *Turner v. Commissioner*, 56 T.C. at 32. Only the trial judge dissented. *Id.* at 33.

12. *Gurney v. Commissioner*, 30 T.C.M. (CCH) 1429 (1971); *Crowson v. Commissioner*, 30 T.C.M. (CCH) 953 (1971).

13. *Norwood v. Commissioner*, 66 T.C. 467, 469 (1976).

14. *Id.*

temporary or indefinite in duration. If the job was temporary, the taxpayer could deduct the expenses incurred going to and from work because they arose "from the exigencies of business and not from the taxpayer's personal choice to live at a distance from his work."¹⁵ If, on the other hand, the job was of indefinite duration, the transportation expenses would not be deductible. The Tax Court subsequently has decided a number of cases using this analysis.¹⁶

Five months after the Tax Court first decided the issue of deductibility of transportation expenses in classical terms, the Internal Revenue Service (IRS) published Revenue Ruling 76-453¹⁷ and announced that it would follow *Turner*. Consequently, transportation expenses between a taxpayer's residence and temporary place of work would not be deductible.¹⁸ The IRS postponed the effective date¹⁹ of Revenue Ruling 76-453 several times²⁰ and finally suspended it indefinitely.²¹

In 1977 Congress directed the IRS and the courts to determine the treatment of transportation costs between a taxpayer's residence and workplace "without regard to Revenue Ruling 76-453 [or] (. . . to any . . . decision reaching the same result as, or a result similar to, the result set forth in such Revenue Ruling) [but] with full regard to the rules in effect before Revenue Ruling 76-453."²² When first enacted, this mandate was to apply to transportation costs that taxpayers paid or incurred between January 1,

15. *Id.*

16. See, e.g., *Portillo v. Commissioner*, 44 T.C.M. (CCH) 1085 (1982); *Hazelton v. Commissioner*, 43 T.C.M. (CCH) 1287 (1982); *Fairey v. Commissioner*, 43 T.C.M. (CCH) 1169 (1982); *Faircloth v. Commissioner*, 43 T.C.M. (CCH) 1115 (1982); *Conte v. Commissioner*, 42 T.C.M. (CCH) 1296 (1981); *Deblock v. Commissioner*, 40 T.C.M. (CCH) 774 (1980); *McCallister v. Commissioner*, 70 T.C. 505, 508 (1978).

In one recent case the Commissioner did not ask the Tax Court to apply the temporary/indefinite test to decide the issue. *Paolini v. Commissioner*, 43 T.C.M. (CCH) 513 (1982), *aff'd*, No. 82-3290 (3d Cir. Jan. 17, 1983). Instead, the Commissioner contended that the taxpayer's daily trips to and from temporary job sites were nondeductible commuting expenses; the Tax Court agreed. See *infra* note 157.

17. 1976-47 I.R.B. 6.

18. Rev. Rul. 76-453, 1976-2 C.B. 86.

19. The effective date originally was Jan. 1, 1977. [1983] 3 FED. TAXES (P-H) ¶ 11, 426.

20. See, e.g., Announcement 77-113, 1977-28 I.R.B. 18 (effective date postponed to Oct. 1, 1977); Announcement 77-23, 1977-7 I.R.B. 31 (effective date postponed to July 1, 1977). See *infra* text accompanying notes 95-99.

21. IRS News Rel. IR-1884 (Sept. 23, 1977), [1977] 6 FED. TAXES (P-H) ¶ 55,898.

22. Act of Oct. 7, 1978, Pub. L. No. 95-427, § 2, 92 Stat. 996. See generally Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980) (analysis of problems caused by legislative prohibitions on the IRS).

1977, and January 1, 1980.²³ Congress then extended the period to June 1, 1981.²⁴ Ostensibly, the purpose of the moratorium was to allow Congress time to study the deductibility of expenses for transportation between a taxpayer's residence and workplace.²⁵ More likely, however, Congress sought to assuage outcries²⁶ over the position that the IRS had expressed in Revenue Ruling 76-453. Indeed, both the Senate and House Reports state that "transportation expenses to temporary worksites other than the taxpayer's principal place of work often are deductible"²⁷

The courts of appeals have applied the temporary/indefinite test to daily transportation expenses even though the Tax Court rejected it in *Turner*.²⁸ For example, the Seventh Circuit recently announced an exception to the general rule of nondeductibility of commuting expenses. Under the Seventh Circuit's approach taxpayers may deduct daily transportation expenses to and from distant temporary job sites under section 162(a).²⁹

This Article examines *Turner* and the efforts of the IRS to resolve the issue of the deductibility of daily transportation expenses to and from distant temporary work sites. The Article compares the Tax Court's view in *Turner* with the approach that the courts of appeals have taken and concludes that although the Tax Court reached the correct result in *Turner*, it espoused a flawed rationale. The Article maintains that the IRS has not interpreted *Turner* satisfactorily. The basic approach of the courts of appeals is sound; hence the Tax Court and the IRS should adopt it. The

23. Act of Oct. 7, 1978, Pub. L. No. 95-427, § 2, 92 Stat. 996 (1978).

24. Act of Dec. 29, 1979, Pub. L. No. 96-167, § 2, 93 Stat. 1275 (1979). The Economic Recovery Tax Act of 1981 did not extend the May 31, 1981, expiration date. See H.R. CONF. REP. NO. 215, 97th Cong., 1st Sess. 268, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 285, 357. But see Rev. Proc. 82-22, § 6, 1982-13 I.R.B. 16, 20-21 (Public Law 96-167 prohibits IRS from ruling on commuting expenses).

25. S. REP. NO. 433, 96th Cong., 1st Sess. 6, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 2594, 2599; H.R. REP. NO. 1232, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2508, 2511.

26. See, e.g., N.Y. Times, Sept. 27, 1977, at 67, col. 1; Wall St. J., Sept. 26, 1977, at 17, col. 1; Wall St. J., June 16, 1977, at 40, col. 2; Wall St. J., Dec. 29, 1976, at 2, col. 1.

27. S. REP. NO. 433, supra note 25, at 5, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 2598; H.R. REP. NO. 1232, supra note 25, at 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2511; see also H.R. REP. NO. 201, 97th Cong., 1st Sess. 284 (Section 806 of H.R. 4242, Tax Incentive Bill of 1981, would have extended the mandate to cover transportation costs paid or incurred after May 31, 1981, and before June 1, 1983.).

28. Neal v. Commissioner, 681 F.2d 1157 (9th Cir. 1982); Kasun v. United States, 671 F.2d 1059 (7th Cir. 1982); Frederick v. United States, 603 F.2d 1292 (8th Cir. 1979); Boone v. United States, 482 F.2d 417 (5th Cir. 1973).

29. Kasun v. United States, 671 F.2d at 1061.

Article also suggests refinements to the appellate courts' approach.

II. *Turner v. Commissioner*

A. *Facts and Holding*

William B. Turner resided in Brooklyn, New York, and worked at a plant of one company in Syosset,³⁰ New York, for sixteen months and then at a plant of another company in Norwalk,³¹ Connecticut, for eight months.³² He obtained employment through two New York City job shops that supplied companies with technical employees to work on specific projects or government contracts. Although Turner received his pay checks from the job shops, he had no contact with them other than to visit their offices at the beginning of his employment in Syosset and Norwalk and to receive a few telephone calls from them.³³

The Tax Court held that Turner was "simply a commuter [who] traveled from his residence to his principal (indeed only) place of duty and returned each night."³⁴ Observing that the job shops merely functioned as employment agencies, the court rejected Turner's argument that the job shops in New York City were his employers and principal places of business.³⁵ The court stated that Turner "was an employee of the job shops in form only; in substance he worked for the client contractors."³⁶ Given the facts, the Tax Court's conclusion that Turner could not deduct his transportation expenses is unassailable. The cost of going between one's residence and place of employment clearly is a nondeductible personal expense.³⁷ The court, however, did not use this direct analysis to reach its result. Furthermore, Judge Dawson used broad language that extended far beyond the facts of the case.

The court began with a disjointed discussion of petitioner's two theories of deductibility, both of which the court rejected. First, the court addressed taxpayer's "primary argument"³⁸ that because he was an employee of the job shops assigned temporarily

30. The Syosset plant was 36 miles from taxpayer's Brooklyn residence. *Turner v. Commissioner*, 56 T.C. at 29.

31. The Norwalk plant was 60 miles from taxpayer's residence. *Id.*

32. *Id.* at 28.

33. *Id.* at 28-29.

34. *Id.* at 32-33.

35. *Id.* at 32.

36. *Id.*

37. See *supra* note 1 and accompanying text.

38. *Turner v. Commissioner*, 56 T.C. at 30.

to work outside the New York City area his transportation costs were deductible under Revenue Ruling 60-147.³⁹ The court declined to find that the job shops were Turner's principal places of business and thus rejected this argument.

Second, the court addressed the taxpayer's alternative argument that because he was a temporary employee, his Brooklyn residence was his tax home, and the transportation costs of going to and from work were deductible expenses that he had incurred "while away from home" within the meaning of section 162(a)(2).⁴⁰ The court rejected this argument, relying on *United States v. Correll*.⁴¹ In that case the United States Supreme Court endorsed the overnight rule, which interprets the phrase "away from home" to require sleep or rest before travel expenses are deductible under section 162(a)(2).⁴² Because Turner did not sleep or rest on his way to and from work, he did not incur travel expenses "away from

39. 1960-1 C.B. 682. Petitioner's Brief and Reply Brief fail to cite the revenue ruling. Indeed, the *pro se* taxpayer's Brief contains no citations and his Reply Brief only refers to four cases that respondent had cited. Respondent's Brief and Reply Brief do not mention this revenue ruling.

The IRS announced in Revenue Ruling 60-147 that it would "no longer litigate cases arising under section 22(n)(2) of the Internal Revenue Code of 1939 where an employee incurs transportation expenses . . . on business trips . . . outside his home area but . . . not . . . overnight." *Id.* Section 22(n)(2) defined adjusted gross income as gross income minus the expenses of travel while away from home. The 1939 Code had no provision comparable to I.R.C. § 62(2)(C), which allows an employee to subtract business transportation expenses from gross income to arrive at adjusted gross income, although the expenses are not reimbursable or incurred while away from home. The IRS pointed out in the revenue ruling that the issue does not arise under the 1954 Code. Hence, the position it had announced applied "only to the deductibility of an employee's nonreimbursable business transportation expenses under section 22(n)(2) of the 1939 Code." *Id.* at 683. The Tax Court's statement in *Turner* that petitioner sought to deduct his transportation costs under Revenue Ruling 60-147 therefore seems erroneous. The court did discuss and quote the revenue ruling several paragraphs later in the opinion. Perhaps the Tax Court was referring to Rev. Rul. 190, 1953-2 C.B. 303, which the dissent cited and discussed, 56 T.C. at 34 n.1, when the court first mentioned Revenue Ruling 60-147. Under Revenue Ruling 190, if a taxpayer works temporarily "at a distance from the metropolitan area in which he is regularly employed," the daily transportation expenses to and from the temporary site are deductible. Rev. Rul. 190, 1953-2 C.B. at 305. The Tax Court may have concluded that Turner failed to establish that the New York City area was his regular place of employment. Alternatively, the court may have rejected the position that the IRS took in Revenue Ruling 190 concerning the deductibility of transportation expenses.

40. *Turner v. Commissioner*, 56 T.C. at 30. Section 162(a)(2) allows a deduction for "traveling expenses (including amounts expended for meals and lodging . . .) while away from home in the pursuit of a trade or business." For a discussion of the history of § 162(a)(2), see Comment, *The Tax Home Doctrine: Fifty-Five Years of Confusion*, 34 ME. L. REV. 141, 142-46 (1982).

41. 389 U.S. 299 (1967).

42. *Id.* at 302, 307.

home" and, therefore, could not deduct them under this provision of the Code.

B. *An Analysis of the Turner Rationale*

The *Turner* court avoided direct resolution of the issue before it and instead announced that "the concepts of 'temporary' or 'indefinite' employment, which bear upon the issue under section 162(a)(2) of whether it is reasonable for a taxpayer to move his residence near his employment, are of little or no value in distinguishing transportation expenses from commuting expenses."⁴³ The Tax Court's use of *Turner*, a case it had reviewed,⁴⁴ to announce its rejection of the temporary/indefinite test is difficult to comprehend, especially since the parties had not argued the issue of the test's application in their briefs, and the court had disposed of taxpayer's arguments on other grounds.

As authority for its statement that the temporary versus indefinite character of the employment has little or no value in determining the deductibility of transportation expenses, the Tax Court cited⁴⁵ footnote twenty-four of *Steinhort v. Commissioner*, which reads in part: "The 'temporary,' 'indeterminate' distinction, although of great use in determining the deductibility of expenses under § 162(a)(2) where work is done in another . . . locality, does not cut into the principle of denying a deduction for 'commuting expenses' . . ." The sentence continues, however, with the qualification "for travel within the same metropolitan area as the taxpayer's established home."⁴⁶ The Tax Court disregarded these

43. *Turner v. Commissioner*, 56 T.C. at 31. The outcome of the temporary/indefinite test has a direct impact on the issue raised by § 162(a)(2)—whether a taxpayer reasonably could be expected to move his residence closer to his place of work and thus avoid incurring duplicate living expenses. See *infra* text accompanying notes 71 & 74-75.

44. The Chief Judge of the Tax Court determines whether review of the trial judge's report is necessary. If the Chief Judge decides that the court will review, he places the case on the conference calendar. At the conference the judges discuss and vote on the trial judge's report. If the majority rejects the report and the trial judge who wrote the original report does not agree with the majority, the Chief Judge assigns the report to another judge for rewriting. H. DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 355-56 (1979). In *Turner* Judge Dawson rewrote the report. Judge Quealy, the trial judge, see Brief for Respondent at 1, *Turner v. Commissioner*, 56 T.C. 27 (1971), who had written the original report, dissented, 56 T.C. at 33.

45. *Turner v. Commissioner*, 56 T.C. at 31.

46. 335 F.2d 496, 504 n.24 (5th Cir. 1964). Two years after the Tax Court decided *Turner*, the Fifth Circuit said that transportation costs for travel outside the area of the principal place of work are deductible if the employment is temporary rather than indefinite. *Boone v. United States*, 482 F.2d 417 (5th Cir. 1973). In *Boone* the court concluded that the employment was indefinite. Consequently, taxpayer's expenses incurred in going to

qualifying words. The entire sentence arguably manifests the Fifth Circuit's belief that transportation expenses for daily travel outside the metropolitan area in which the taxpayer usually works are deductible under section 162(a). The text of the opinion accompanying footnote twenty-four states that "where a construction worker obtains employment at a 'temporary' place of work—temporary in the sense that a worker would not reasonably move his family to that area—travel costs are deductible."⁴⁷ Nevertheless, in *Turner* the Tax Court refused to apply the temporary/indefinite test to transportation expenses under section 162(a).⁴⁸

The Tax Court's notion in *Turner* that transportation expenses for one-day trips without sleep or rest are not deductible under section 162(a)(2) is unwarranted. The Supreme Court in *Correll* did not specifically address the issue because the case concerned only deductions for meal expenses. The question before the Supreme Court concerned the validity of the Commissioner's long-standing rule "that a taxpayer traveling on business may deduct the cost of his meals only if his trip requires him to stop for sleep or rest."⁴⁹ *Correll*, therefore, left undecided the question whether the overnight rule applies to transportation expenses. Moreover, the rationale in the opinion, which addresses meal expenses, is not applicable to transportation expenses. The Court examined the language of section 162(a) and indicated that paragraph (2) supports the rule because the section refers to meals in conjunction with lodging. The Court noted that the statute specifies "meals and lodging," which suggests that Congress contemplated a deduction for meals only when the travel also requires lodging.⁵⁰ "Lodging," of course, denotes stopping to sleep or rest. The treatment of meals and lodging as a unit does not necessarily require the inclusion of transportation in that unit.⁵¹ Nevertheless, several courts of appeals agree with the position that the Tax Court took in *Turner*:

and from the job site did not qualify for deduction under I.R.C. § 162(a).

47. 335 F.2d 496, 504 (5th Cir. 1964).

48. See *infra* notes 71-76 and accompanying text.

49. *United States v. Correll*, 389 U.S. at 299.

50. *Id.* at 304.

51. For commentary that daily transportation expenses are not deductible under § 162(a)(2), see Note, *Extraordinary Commuting Expenses: Deductibility of Transportation Expenses Between Residence and Temporary Place of Business*, 51 S. CAL. L. REV. 499, 501-05 (1978); Comment, *Federal Income Taxation—A Survey of Commuting Deductions Under § 162 of the Internal Revenue Code and the Ramifications of United States v. Correll*, 60 Ky. L.J. 427, 436-39 (1972); Comment, *Travel, Transportation, and Commuting Expenses: Problems Involving Deductibility*, 43 Mo. L. Rev. 525, 530-31 (1978) [hereinafter cited as Comment, *Travel, Transportation, and Commuting Expenses*].

that the overnight rule applies to *all* travel expenses which taxpayers claim as deductions under section 162(a)(2), not just expenses for meals and lodging.⁵²

III. POST-*Turner* TAX COURT OPINIONS

Although the Tax Court in 1976 applied the temporary/indefinite test for daily transportation expenses,⁵³ the *Turner* rationale did not disappear from the court's opinions. Both before and after the Second Circuit vacated and remanded *Turner* in 1972, the Tax Court cited *Turner* and made no attempt to limit it to its facts. For example, in *Crowson v. Commissioner*⁵⁴ the Tax Court denied an oilfield worker a deduction for the cost of transportation to five different job sites during one year. In an opinion by Judge Tietjens, the court noted that the temporary/indefinite test has little or no importance in distinguishing deductible transportation expenses from commuting expenses.⁵⁵ However, taxpayer had no place of business from which to be away temporarily because apparently he did not work regularly near his residence.⁵⁶ Consequently, the reference to the temporary/indefinite distinction in *Crowson* was unnecessary, as it was in *Turner*.

In *Gurney v. Commissioner*⁵⁷ the Tax Court relied on *Turner* to reject taxpayer's contention that the alleged temporary nature of his job as a truck driver at a construction site about sixty miles from his residence converted what otherwise would have been nondeductible commuting expenses into ordinary and necessary business expenses under section 162(a). The taxpayer in *Gurney* worked continuously at the construction site for more than two years. Judge Dawson, who wrote the *Turner* opinion, again observed that the notion of temporary employment has little or no value in distinguishing deductible transportation expenses from nondeductible commuting expenses.⁵⁸ The proper issue in *Gurney* simply was whether a taxpayer may deduct the expenses of work-day trips between his residence and his principal place of employ-

52. See, e.g., *Frederick v. United States*, 603 F.2d 1292, 1295 n.5 (8th Cir. 1979); *Boone v. United States*, 482 F.2d 417, 419 n.2 (5th Cir. 1973); *Sanders v. Commissioner*, 439 F.2d 296, 298 (9th Cir.), cert. denied, 404 U.S. 864 (1971); *United States v. Tauferner*, 407 F.2d 243, 245 (10th Cir.), cert. denied, 396 U.S. 824 (1969).

53. See *supra* text accompanying notes 13-16.

54. 30 T.C.M. (CCH) 953 (1971).

55. *Id.* at 954.

56. *Id.* at 953-54.

57. 30 T.C.M. (CCH) 1429 (1971).

58. *Id.* at 1430.

ment. The court held that these expenses are not deductible because they enabled taxpayer only to go to and from work.⁵⁹ Judge Dawson could have added that *Turner* presented the identical issue and demanded the same conclusion on the ground that the costs of transportation to and from the principal place of employment always are nondeductible.

In *McCallister v. Commissioner* the Tax Court further extended *Turner* by citing it for the proposition that "automobile expenses in commuting between the taxpayer's residence and even a temporary jobsite *outside a taxpayer's normal area of employment* are not deductible."⁶⁰ The court reiterated this interpretation of *Turner* in *Conte v. Commissioner*.⁶¹ This view of *Turner* is incorrect. *Turner* went from his residence in Brooklyn to his places of work in Syosset and Norwalk and returned each night.⁶² The facts do not indicate that *Turner* went to temporary job sites outside the normal area of his employment. Indeed, the Tax Court rejected *Turner's* argument that the New York City job shops were his principal places of business.

The Tax Court's extension of *Turner* in these recent opinions is unwarranted. Courts and the IRS could apply this expansive interpretation of *Turner* to deny deductions for transportation expenses that taxpayers incur on long one-day business trips. For example, a taxpayer who travels by automobile from his residence, located ten miles from a downtown office in which the taxpayer maintains a principal place of employment, to a business meeting 150 miles away and who returns directly to his residence on the same day could not deduct the transportation expenses.⁶³

In contrast to the court's extension of *Turner* in *McCallister* and *Conte*, in *Pilcher v. Commissioner*⁶⁴ the court declined to discuss the issue of the deductibility of transportation expenses for a

59. *Id.*

60. 70 T.C. 505, 508 (1978) (emphasis added). In *Portillo v. Commissioner*, 44 T.C.M. (CCH) 1085 (1982), Judge Drennen, citing *Turner*, commented that the court has held that transportation expenses in commuting between one's residence and even a temporary job site outside the normal area of employment are not deductible. This overbroad interpretation of *Turner* also appears in Rev. Rul. 76-453, 1976-2 C.B. 86. See *infra* text accompanying note 94.

61. 42 T.C.M. (CCH) 1296, 1298 (1981). Although the Tax Court cited *Turner* in *Conte* and *McCallister*, it did rely upon the temporary/indefinite test to determine the deductibility of transportation costs because the parties so framed the issue.

62. *Turner v. Commissioner*, 56 T.C. at 32-33.

63. Perhaps the statements in *McCallister*, *Portillo*, and *Conte* should be regarded simply as dictum.

64. 38 T.C.M. (CCH) 1089, 1091 (1979), *aff'd*, 651 F.2d 717 (10th Cir. 1981).

taxpayer whose job requires him to go outside his primary work area if he returns to his residence each day. This refusal in *Pilcher* was a result of the court's unwillingness to decide an issue that the Commissioner had conceded. Recently, the court has indicated that regardless of the nature of the work, the distance the taxpayer has traveled, or the mode of transportation, travel from the residence to the location where work begins and from the location where work ceases to the residence represents commuting.⁶⁵ Thus, the Tax Court appears to have adopted the sweeping pronouncements of the *McCallister* and *Conte* opinions and moved away from the temporary/indefinite test for transportation costs.

IV. *Turner* AND THE COURT OF APPEALS: A COMPARISON OF APPROACHES

Although in *Turner* the Tax Court rejected the concepts of temporary and indefinite employment in distinguishing section 162(a) transportation expenses from nondeductible commuting expenses,⁶⁶ the courts of appeals have applied the temporary/indefinite test to decide whether daily expenses incurred in going to and coming from distant work sites are deductible.⁶⁷ The Court of Appeals for the Seventh Circuit recently justified its use of the test by observing that the nondeductibility of commuting expenses is "based on the assumption that a person will choose to live near the work place."⁶⁸ Consequently, if an individual lives a distance from his place of indefinite employment, transportation expenses to and from work are nondeductible, personal expenses. Because a person cannot be expected to move his residence near a temporary work site,⁶⁹ his transportation expenses to and from that site should be deductible. In other words, "[t]he job, not the taxpayer's pattern of living, must require the travel"⁷⁰ before expenses are

65. *Paolini v. Commissioner*, 43 T.C.M. (CCH) 513, 518 (1982), *aff'd*, No. 82-3290 (3d Cir. Jan. 17, 1983).

66. *Turner v. Commissioner*, 56 T.C. 27, 31 (1971); *see also Deblock v. Commissioner*, 40 T.C.M. (CCH) 774 (1980) (temporary/indefinite test relevant to § 162(a)(2) cases, not to general § 162(a) cases). *Faircloth v. Commissioner*, 43 T.C.M. (CCH) 1115 (1982) (same proposition as *Deblock*); *see infra* text accompanying notes 71-76.

67. *Neal v. Commissioner*, 681 F.2d 1157 (9th Cir. 1982); *Kasun v. United States*, 671 F.2d 1059 (7th Cir. 1982); *Frederick v. United States*, 603 F.2d 1292 (8th Cir. 1979); *Boone v. United States*, 482 F.2d 417 (5th Cir. 1973).

68. *Kasun v. Commissioner*, 671 F.2d at 1061.

69. *Carragan v. Commissioner*, 197 F.2d 246, 249 (2d Cir. 1952). This language appears in *Kasun v. Commissioner*, 671 F.2d at 1061, and in *Commissioner v. Peurifoy*, 254 F.2d 483, 486 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958).

70. *Kasun v. Commissioner*, 671 F.2d at 1061 (quoting *Commissioner v. Peurifoy*, 254

deductible.

The Tax Court in *Turner* acknowledged that the temporary/indefinite test concerns the question whether a taxpayer reasonably would move his residence closer to the place of employment.⁷¹ The court rejected the use of this test to determine the deductibility of transportation expenses to and from temporary work sites, however, because the court originally had devised the test for section 162(a)(2), which addresses the deductibility of overnight travel expenses.⁷² Nevertheless, the court fails to explain why it could not borrow the test and apply it to transportation expenses under section 162(a).⁷³ *Turner* suggests that the test's only use is to determine whether the taxpayer has duplicate living expenses.⁷⁴ This narrow approach overlooks the premise on which the nondeductibility of commuting expenses rests—namely, that the taxpayer is free to choose the location of his residence relative to his job.⁷⁵ If a person normally lives and works near the place of indefi-

F.2d 483, 486 (4th Cir. 1957), *aff'd*, 358 U.S. 59 (1958) (quoting *Carragan v. Commissioner*, 197 F.2d 246, 249 (2d Cir. 1952)). The court explained in *Frederick v. United States*, 603 F.2d at 1295:

A taxpayer has considerable discretion in determining where he wants to live when he will be employed in a location for a substantial or indefinite period of time. This discretion is severely limited or nonexistent when a taxpayer will be employed for only a short or temporary period of time. Thus, the choice of a residence is a personal decision in the first situation, and a business decision in the latter.

The court observed that the temporary/indefinite test serves a function in the context of § 162(a) similar to its role in § 162(a)(2) when an attempt is made to discern whether transportation expenses are incurred for a business, rather than a personal, purpose. "The underlying premise in both situations is the idea that a taxpayer's choice of a residence is circumscribed by his expected term of employment." *Id.*; see also *Hazelton v. Commissioner*, 43 T.C.M. (CCH) 1287 (1982) (court may consider some otherwise personal expenses as arising from exigencies of business and not from personal choice to live at distance from work if employment temporary).

71. *Turner v. Commissioner*, 56 T.C. at 31.

72. Under I.R.C. § 162(a)(2) (1976) "traveling expenses (including amounts expended for meals and lodging . . .) while away from home in the pursuit of a trade or business" are deductible. See *supra* text accompanying note 42.

73. Section 162(a) states that "[t]here 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, . . ."

74. *Turner v. Commissioner*, 56 T.C. at 32.

75. See, e.g., *Gilberg v. Commissioner*, 55 T.C. 611, 616-17 (1971). Writing for the Tax Court, Judge Simpson explained in *O'Hare v. Commissioner*, 54 T.C. 874, 875 (1970): "Although commuting expenses are incurred in order to reach one's place of employment, they are treated as nonbusiness expenses since their amount depends upon the place where one chooses to reside—a choice which results from personal and family considerations." In *Sullivan v. Commissioner*, 1 B.T.A. 93 (1924), the Board of Tax Appeals adopted the reasoning of the Commissioner set forth in S.M. 1048, 1 C.B. 101, 102-03 (1919):

Obviously an individual is free to fix his residence wherever he chooses. He fixes it

nite employment but must work temporarily at a distant site, the location of his residence in relation to that site is not a matter of personal convenience and preference. In *Turner* the Tax Court appropriately could have applied the temporary/indefinite test to determine whether the taxpayer was free to choose the location of his residence relative to his job and, ultimately, whether his transportation costs were deductible under section 162(a). Instead, the court appeared unduly concerned that the temporary/indefinite test originated with section 162(a)(2).

The duplicate expense rationale underlying the deductibility of travel-away-from-home expenses, of course, is inapplicable to daily transportation expenses to and from a temporary place of work at a distance from the indefinite place of employment. This distinction, however, should not preclude borrowing the temporary/indefinite concept to resolve the issue of deductibility of transportation expenses under section 162(a). A separate rationale exists for applying the concept under section 162(a)—the inability of the taxpayer to determine the location of his residence in relation to his temporary work site. Indeed, courts of appeals have referred to the concept as “the best method that has evolved for dealing with claims” arising under section 162(a) of taxpayers who may make daily trips outside their principal work areas.⁷⁶

according to his personal convenience and inclinations, as a matter separate and apart from business. Any expense, therefore, incident to such residence as fixed by the individual is a matter personal to him. If he prefers, for personal reasons, to live in a different city from that in which his business or employment is located, any expense incident to so doing is the result of decision based upon personal convenience and preference, and it is not the result of anything undertaken for business purposes and, therefore, is not a business expense.

1 B.T.A. at 95. See also *Anderson v. Commissioner*, 60 T.C. 834, 835 (1973) (personal preferences influence differences in distances traveled and amounts spent on commuting).

The Tax Court also has stated that commuting expenses are not deductible because they are “so inherently personal in nature as to prohibit their characterization as business expenses.” *Teil v. Commissioner*, 72 T.C. 841, 847 (1979); see also *Pevsner v. Commissioner*, 628 F.2d 467, 469 (5th Cir. 1980) (although helpful or essential to business activities, commuting expenses disallowed under § 162 because they are inherently personal). From an economist’s perspective, “[a] great part of commuting expenses may be regarded as the consequence of a consumption preference exercised in choosing a place of residence.” R. GOODE, *THE INDIVIDUAL INCOME TAX* 78 (rev. ed. 1976).

76. *Kasun v. United States*, 671 F.2d 1059, 1063 (7th Cir. 1982). The Ninth Circuit has adopted the *Kasun* opinion. *Neal v. Commissioner*, 681 F.2d 1157, 1159 (9th Cir. 1982). Two years after the Tax Court decided *Turner*, the Fifth Circuit held that daily transportation expenses between residence and work are deductible if the taxpayer’s employment is temporary. *Boone v. United States*, 482 F.2d 417, 419 (5th Cir. 1973). The Eighth Circuit applied the temporary/indefinite test in *Frederick v. United States*, 603 F.2d 1292, 1294-95 (8th Cir. 1979), in affirmance of the district court’s judgment allowing a deduction for transportation

V. THE CHANGING IRS VIEW

Following the Tax Court's opinion in *Turner* the IRS struggled to formulate its own position. Vacillation and faulty analysis have marred these efforts. Nevertheless, an examination of IRS activity illustrates the difficulty of devising a framework that affords reasonable certainty, uniformity, and fairness.

Soon after the Tax Court decided *Turner* the Commissioner moved to vacate and remand the case for entry of a new decision.⁷⁷ This reversal of position followed a series of conferences "between counsel for the appellee in the Tax Division of the Department of Justice and . . . officials of the Internal Revenue Service and of the Office of the Chief Counsel of the Internal Revenue Service."⁷⁸ The government may have assumed that by filing a motion to vacate and remand the case for entry of no deficiency, the original Tax Court opinion would have no precedential value.⁷⁹ Moreover, the

expenses incurred between residence and a temporary work site. The Eighth Circuit concluded that the district court's finding of temporary employment was not clearly erroneous. In Rev. Rul. 80-333, 1980-2 C.B. 60, the IRS announced that it will not follow *Frederick* because "[t]he Eighth Circuit's approach conflicts in principle with a long line of judicial authority holding such expenses are not deductible." The IRS cited *Commissioner v. Flowers*, 326 U.S. 465 (1946), and *Peurifoy v. Commissioner*, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958). The IRS added that *Frederick* was contrary to Rev. Rul. 60-189, 1960-1 C.B. 60. Rev. Rul. 80-333, 1980-2 C.B. 60. Revenue Ruling 60-189 contains an extensive discussion of the deductibility of traveling expenses, including amounts that taxpayers expend for meals and lodging when they work at construction sites that are distant from their residences and from the places where they usually work or make employment contacts.

77. See *supra* notes 7-9 and accompanying text.

78. Appellee's Motion to Vacate Decision of Tax Court, at 2, *Turner v. Commissioner*, No. 71-1926 (2d Cir. Feb. 28, 1972). On May 18, 1972, the Tax Court entered the order vacating the June 14, 1971, decision of the court, and on June 16, 1972, the Tax Court entered the order of no deficiency. *Turner v. Commissioner*, No. 4374-68 (T.C. June 16, 1972).

79. See *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975); see also *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (a decision vacating a judgment deprives the lower court's opinion of precedential effect). *But see id.* at 646 n.10 (according to the dissent, although a decision vacating a judgment necessarily prevents the opinion from being the law of the case, expressions of the court below on the merits continue to have precedential weight). In the *Turner* proceedings the Commissioner moved to vacate "the decision of the Tax Court" and to remand for entry of "a new decision" to the effect that no deficiency existed. Appellee's Motion to Vacate Decision of Tax Court at 1, *Turner v. Commissioner*, No. 71-1926 (2d Cir. Feb. 28, 1972). The Commissioner did not move to vacate the report or opinion of the Tax Court. The Second Circuit vacated "the decision of the United States Tax Court dated June 14, 1971," and remanded "for entry of a new decision." Order Granting Appellee's Motion to Vacate and Remand, *Turner v. Commissioner*, No. 71-1926 (2d Cir. Mar. 21, 1972). The court had filed the report for *Turner*, which appears at 56 T.C. 27, on April 8, 1971. The statement "*Decision will be entered under Rule 50*" appears at the end of the report. 56 T.C. at 33. Under Rule 50, the predecessor of current Rule 155, the parties

absence of Tax Court reports relying on *Turner* from the time that the Second Circuit granted the motion until 1976, when the Tax Court decided *Norwood v. Commissioner*,⁸⁰ suggests that the Commissioner had conceded the deductibility of transportation expenses as he finally did in *Turner*.

Five years after the *Turner* opinion the IRS framed the transportation expense issue in *Norwood*⁸¹ "in classical terms, namely, whether petitioner's employment . . . was 'temporary' or 'indefinite.'"⁸² The Tax Court stated that under this approach *Turner* had no bearing.⁸³ Lawrence W. Norwood had been a member of a steamfitter's local union in Washington, D.C., since 1964. He resided near the District of Columbia in Adelphi, Maryland. Because of a shortage of work in the Washington, D.C., area, the union sent Norwood to Lusby, Maryland, in October 1971. Initially, Norwood expected his assignment at Lusby to last six months. Actually he worked in Lusby, which is about fifty miles southeast of Washington, D.C., until December 1974. Whenever Norwood went to Lusby he drove from his residence in Adelphi to the work site and returned the same day.⁸⁴ Revenue Ruling 190 required the IRS to allow Norwood to deduct his transportation expenses if he was employed temporarily at Lusby.⁸⁵ The court held that Norwood could deduct his transportation expenses from October 1971 until March 1972, when his initial assignment ended.⁸⁶ According to the court, employment is temporary if the taxpayer expects it to last for only

in *Turner* submitted computations showing the amount of deficiency. The court then entered its decision. On remand the Tax Court entered the decision June 16, 1972, which stated that "there [was] no deficiency." *Turner v. Commissioner*, No. 4374-68 (T.C. June 16, 1972).

80. 66 T.C. 467 (1976).

81. *Id.*

82. *Id.* at 469; see *supra* note 16 and accompanying text.

83. 66 T.C. at 469.

84. *Id.* at 468.

85. 1953-2 C.B. 303. Revenue Ruling 190 provides in part that if a person works for a temporary period "at a distance from the metropolitan area in which he is regularly employed," expenses for daily transportation are deductible. *Id.* at 305. The rationale for this statement is that the taxpayer is not going between his residence and his principal or regular place of business. Since the taxpayer lives and customarily works in the metropolitan area and does not have regular employment at a specific location or with one employer, his principal or regular place of employment is the metropolitan area itself. Transportation expenses between the metropolitan area and the taxpayer's work site are "necessarily incurred for business reasons, rather than for personal reasons as in the case of a commuter who fixes his residence as a matter of personal convenience and preference at a distance from his regular place of business." *Id.*

86. *Norwood v. Commissioner*, 66 T.C. at 471.

a short time.⁸⁷ Because Norwood's first assignment was to continue for only six months, the assignment was temporary.

A few months after the court filed its report for *Norwood*, the IRS changed its position:⁸⁸ it published Revenue Ruling 76-453, which revoked Revenue Ruling 190,⁸⁹ and cited *Turner*.⁹⁰ Reading *Turner* unnecessarily broadly, the Service determined that transportation expenses between a person's residence and temporary place of business are not deductible.

Revenue Ruling 76-453 sets forth several examples, some of which merely restate prior law. Thus, in Example (2) of the revenue ruling the IRS allowed no deduction for a taxpayer without a principal or regular place of business who drove seventy miles each way between residence and work. Consistent with *Turner*, the IRS regarded this taxpayer as a commuter. Example (3), which also reflected the application of prior law, described a self-employed individual who maintained a principal place of business in a downtown office building. To attend a business meeting in a distant city, the taxpayer drove directly from his residence to an airport and flew to the meeting. The same day he returned directly to his residence. The IRS stated that the taxpayer could deduct transportation costs for the entire trip because Revenue Ruling 55-109 allows deduction of transportation costs between work locations.⁹¹ The IRS added that, "in effect," the taxpayer traveled between two work locations.⁹² The IRS was willing to allow the expenses of the *entire* trip because, it reasoned, the difference between the cost of going from the residence to the business meeting, on the one hand, and the cost of going from the office to the business meeting, on the other hand, is generally de minimis when compared with the total cost.⁹³

In Example (5) of Revenue Ruling 76-453 the IRS illustrated its repudiation of Revenue Ruling 190 and its acceptance of *Tur-*

87. *Id.* at 469 (quoting *Tucker v. Commissioner*, 55 T.C. 783, 786 (1971)).

88. Rev. Rul. 76-453, 1976-2 C.B. 86.

89. *Id.* at 88.

90. *Id.* at 86.

91. 1955-1 C.B. 261. Thus, "[w]here an employee having only *one* employer is required to work part of the same day at each of two different locations within the same city, it is clear that he must make a business trip which is directly attributable to the actual performance of his duties, and that his necessary transportation expenses in going from his first to his second place of employment would generally be deductible." *Id.* at 263 (emphasis in original).

92. Rev. Rul. 76-453, 1976-2 C.B. at 87.

93. *Id.*

ner. This example declared that the costs of daily trips to work at different locations for temporary periods are not deductible even if the taxpayer traveled outside the metropolitan area in which he lived and ordinarily worked. The rationale for this rule is that no deduction should be allowable for transportation expenses between the residence and place of work.⁹⁴

Although Examples (3) and (5) of Revenue Ruling 76-453 are factually dissimilar, the outcomes should be the same. The different results that the IRS reached highlight the problems of applying a wooden reading of *Turner* and the inconsistency of the IRS's interpretation of that case. Under Revenue Ruling 76-453 a taxpayer with a principal place of business in a building can deduct the entire expense for transportation to another work place outside the area of regular employment. On the other hand, a taxpayer who usually works at different sites within the same area may deduct none of the transportation expenses to a temporary work place outside that area.

Revenue Ruling 76-453 was controversial from the outset.⁹⁵ The focus of the criticism was that the revenue ruling encouraged workers like accountants and lawyers to go first to the office, even if that trip was unnecessary, because they then could deduct the second trip from the office to the job site even if they did not go outside their regular work area. Construction workers must have felt especially aggrieved by the consequences of this revenue ruling. Lacking regular places of work to which they could report first, these workers could take no deduction for travel outside their normal employment areas.

The IRS postponed the effective date of Revenue Ruling 76-453 from January 1, 1977, to April 1, 1977, to allow the incoming Carter Administration an opportunity to review the new position.⁹⁶ When the IRS announced a second delay of the effective date to July 1, 1977, it said that it was extending the time to permit employers to adjust their payroll systems because they would have to withhold taxes if employers reimbursed employees.⁹⁷ A few days later the IRS changed the effective date of Revenue Ruling 76-453 to October 1, 1977, again to give employers time to adjust their

94. *Id.* at 87.

95. See, e.g., N.Y. Times, Sept. 27, 1977, at 67, col. 1; Wall St. J., Sept. 26, 1977, at 17, col. 1; Wall St. J., June 16, 1977, at 40, col. 2; Wall St. J., Dec. 29, 1976, at 2, col. 1.

96. Wall St. J., Dec. 29, 1976, at 2, col. 1; see *supra* text accompanying notes 19-21.

97. Wall St. J., June 16, 1977, at 40, col. 2.

payroll systems.⁹⁸ Finally, the IRS suspended the revenue ruling indefinitely.⁹⁹ The IRS announced that it would publish proposed regulations "shortly"¹⁰⁰ to allow public comment.¹⁰¹ Less than two months after the IRS suspended Revenue Ruling 76-453, it advised its personnel that "[n]o adjustment or claim disallowance will be proposed for substantiated transportation expenses to *temporary* job sites regardless of the distances traveled, *within* or *without*" the metropolitan area where the taxpayer resides and ordinarily works.¹⁰² The rationale for this new position was that "no legal differentiation" exists between transportation expenses to temporary work sites outside the metropolitan area and to temporary work sites within the area.¹⁰³ This view contrasted sharply with prior judicial and administrative interpretations.

Although the IRS seems willing to concede the issue of deductibility of transportation expenses to temporary job sites within and without the taxpayer's metropolitan area, it has not informed the public of this development. Rather, the IRS has stated repeatedly that nondeductible "commuting" expenses include transportation expenses between a taxpayer's residence and different work locations on different days within the same city or general area, while daily, round trip transportation expenses between the residence and temporary assignments beyond the general area of residence and regular work are deductible.¹⁰⁴ Consequently, the published statements of the IRS for taxpayers reiterate the position that it first took in Revenue Ruling 190,¹⁰⁵ which is still in effect because of the suspension of Revenue Ruling 76-453.¹⁰⁶ The public position that the IRS has taken may be attributable to the congressional mandate that the IRS determine the deductibility of

98. Wall St. J., June 29, 1977, at 13, col. 2.

99. IRS News Rel. IR-1884 (Sept. 23, 1977), [1977] 6 FED. TAXES (P-H) ¶ 55,898; see *supra* text accompanying notes 19-21.

100. N.Y. Times, Sept. 27, 1977, at 67, col. 1.

101. Wall St. J., Sept. 26, 1977, at 17, col. 1.

102. II INTERNAL REV. MAN. (CCH) ch. 4500, pt. IV, 45(11)(17)(6), at 8217-4 (Nov. 3, 1977) (emphasis in original). In general, the Manual does not bind revenue agents, but it does serve to provide guidance. Letter Rul. 8246013 (June 30, 1982); see II INTERNAL REV. MAN. (CCH) ch. 4000, pt. IV, 4012, at 7006 (Oct. 29, 1981).

103. II INTERNAL REV. MAN. (CCH) ch. 4500, pt. IV, 45(11)(17)(4), at 8217-4 (Nov. 3, 1977).

104. U.S. TREAS. DEF'T, INT. REV. SERV., YOUR FEDERAL INCOME TAX FOR INDIVIDUALS (Pub. 17) at 64 (rev. Oct. 1977). The IRS has published identical statements subsequently. *Id.* at 60 (rev. Nov. 1978); *id.* at 64 (rev. Nov. 1979); *id.* at 69 (rev. Nov. 1980); *id.* at 64 (rev. Nov. 1981); *id.* at 68-69 (rev. Nov. 1982).

105. 1953-2 C.B. 303. See *supra* note 85.

106. 1976-2 C.B. 86. See *supra* note 99 and accompanying text.

transportation costs paid or incurred between January 1, 1977, and June 1, 1981, without regard to Revenue Ruling 76-453 or any similar decision.¹⁰⁷ The legislative history of Congress' action indicates that transportation expenses to temporary work sites other than the principal place of work "often" are deductible.¹⁰⁸

VI. A CRITIQUE OF OTHER PROPOSALS

Congress and legal commentators along with the IRS have struggled to devise a workable solution to the problem of the deductibility of transportation expenses. Although Congress has been aware of the problem of the deductibility of transportation expenses to and from temporary work sites for at least two decades, but has been unwilling to legislate a bright-line test,¹⁰⁹ even when the President has proposed remedial legislation.¹¹⁰ Under the presidential proposal a taxpayer could not deduct transportation expenses for traveling between his residence and any place within a "duty area,"¹¹¹ defined by a circle having a twenty-mile radius with the taxpayer's principal post of duty at its center. If a taxpayer had no principal place of business, his residence would serve as the center of the duty area.¹¹² Travel expenses to a temporary work

107. Act of Dec. 29, 1979, Pub. L. No. 96-167, § 2, 93 Stat. 1275 (1979); Act of Oct. 7, 1978, Pub. L. No. 95-427, § 2, 92 Stat. 996 (1978); see *supra* text accompanying notes 22-24.

108. S. REP. No. 433, *supra* note 25, at 5, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 2598; H.R. REP. No. 1232, *supra* note 25, at 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2511.

109. One commentator has set forth four possible bright-line statutory rules. Hoff, *Tax Treatment of Home-To-Work Expenses*, 6 REV. TAX'N INDIVIDUALS 40 (1982). These rules are as follows: (1) "Treat daily home-to-work trip expenses as personal and allow an itemized deduction for the outlay computed as an amount in excess of a stated percentage of adjusted gross income." *Id.* at 60. (2) "Treat daily home-to-work trip expenses in excess of a stated number of miles as an adjustment to gross income. Place a dollar limitation on the maximum amount allowable." *Id.* at 61. (3) "Treat all unreimbursed home-to-work trip expenses as nondeductible personal expenses." *Id.* (4) "Treat daily home-to-work trip expenses like expenses incurred for child and dependent care and allow all taxpayers a credit against tax for a percentage of such expenses up to a stated maximum dollar amount." *Id.* at 60-61.

One economist has justified the rule disallowing deduction of commuting expenses on the grounds that permitting deduction would accentuate existing inequities between suburban home owners and urban apartment renters, encourage further decentralization, and stimulate extravagant means of commuting. R. GOODE, *supra* note 75, at 78.

110. President's 1963 Tax Message, *Hearings on Tax Recommendations of President Contained in Message Transmitted to Congress Jan. 24, 1963, before House Comm. on Ways and Means*, 88th Cong., 1st Sess., pt. 1, at 98 (1963) [hereinafter cited as President's 1963 Tax Message].

111. *Id.* at 99.

112. *Id.* at 98.

site beyond the duty area would be deductible under the proposed legislation.¹¹³ Furthermore, a taxpayer would be temporarily away from the duty area unless he reasonably could have foreseen that he would remain at a new place of work for at least a year or he actually remained there for a year.¹¹⁴

In 1978 one commentator proposed the addition of a new subsection to section 162¹¹⁵ that would allow a deduction for transportation expenses between a taxpayer's residence and temporary place of business for any amount in excess of the cost that the taxpayer normally incurred traveling between his residence and his permanent place of business. For a taxpayer whose employment consists of a series of temporary jobs, a twenty-five mile radius would distinguish nondeductible commuting expenses from deductible business expenses.¹¹⁶

The proposal contains a defect in its treatment of a taxpayer who has a permanent place of business. The proposal fails to prevent the potential abuse that can result from a taxpayer's application of Revenue Ruling 55-109.¹¹⁷ The revenue ruling acknowledges that transportation expenses between business locations are deductible.¹¹⁸ To avoid the commuting characterization and thus maximize the deduction for transportation expenses, a taxpayer

113. JOINT COMM. STAFF ON INT. REV. TAX., 88TH CONG., 1ST SESS., SUMMARY OF PRESIDENT'S 1963 TAX MESSAGE AS PRESENTED TO HOUSE COMM. ON WAYS AND MEANS 31 (Comm. Print 1963).

114. President's 1963 Tax Message, *supra* note 110, at 98.

115. Note, *Extraordinary Commuting Expenses: Deductibility of Transportation Expenses Between Residence and Temporary Place of Business*, 51 S. CAL. L. REV. 499, 521-25 (1978).

116. *Id.* at 521. For the suggestion that daily transportation expenses beyond a 10-mile radius from residence to temporary job should be deductible, see Klein, *Income Taxation and Commuting Expenses: Tax Policy and the Need for Nonsimplistic Analysis of "Simple" Problems*, 54 CORNELL L. REV. 871, 895 (1969). Nine miles is the average commuting distance. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *THE JOURNEY TO WORK IN THE UNITED STATES: 1975*, at 6 (1979). Under I.R.C. § 162(h)(4), [I Code] FED. TAXES 25,196.50 (P-H) (1982) a state legislator's residence within the legislative district must be more than 50 miles from the capitol building before the legislator can make a subsection (h) election. Subsection (h) provides in part that the legislator's residence within the district constitutes his home for purposes of § 162(a).

117. 1955-1 C.B. 261. See Note, *supra* note 115, at 521 & n.125, 522 n.126.

118. *Id.* at 263; see *supra* note 91. For an opinion that supports and illustrates the principle, see *Green v. Commissioner*, 59 T.C. 456, 460 (1972). An excellent discussion of the methods for computing the deduction when a taxpayer works at two locations the same day appears in 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, 647-50 (1977). Letter Rul. 8023052 (Mar. 12, 1980) applies Revenue Ruling 55-109 to a taxpayer with three jobs.

merely has to make a business stop close to his residence on the way to the permanent place of business and again on the way back to his residence at the end of the day. The proposal's commuting floor, which only applies to the trip from residence to temporary work site and back, is not broad enough to prevent this abuse.¹¹⁹

For the temporary employee, however, no floor is necessary. Without a permanent work location the temporary employee cannot avoid a fixed commuting distance. The only reasonable and economical route for a temporary employee with several stops in one day is to start with the closest location, work out to the farthest stop, and reverse the process on the return to his residence.¹²⁰ The remaining problem for the temporary employee is to define properly the work area that establishes his fixed commuting distance. An arbitrarily drawn circle with a twenty-five mile radius is inappropriate because it lacks an economic foundation.

Another commentator has suggested a similar approach, although the plan rests on the assumption that the IRS and the courts will reinterpret section 162(a).¹²¹ Under this plan a taxpayer with a principal work site would be able to deduct the cost of transportation in excess of the cost of one round trip a day to that site.¹²² Even a taxpayer without a permanent work site would be able to deduct the "comparative excess cost," which would be the difference between the transportation expense from the taxpayer's residence to the temporary site and the transportation expense from the taxpayer's residence to the edge of the general work

119. A taxpayer who has a principal place of work outside the residence may be able to deduct the expenses in excess of the cost of one round trip a day to that place. *See* Shea v. Commissioner, 38 T.C.M. (CCH) 1178 (1979); *cf.* Laurano v. Commissioner, 69 T.C. 723, 726 (1978) (daily transportation expenses from residence to first business related stop and from last business related stop to residence are nondeductible commuting expenses to extent distance traveled does not exceed distance between residence and principal place of work). The taxpayer, however, should not deduct expenses for personal trips, such as those to eat or rest.

120. If the taxpayer has an office in his residence that is his principal place of business, trips to other work sites are deductible. *Curphey v. Commissioner*, 73 T.C. 766, 778 (1980) (appeal pending); *see also* Wisconsin Psychiatric Servs., Ltd. v. Commissioner, 76 T.C. 839, 849 (1981) (taxpayer may deduct transportation expenses between his residence and other places of business if the office in the residence is so central to the enterprise that the trips constitute normal business transportation).

121. Dilman, *Automobile Transportation Expenses: A Rough Tax Road*, 55 TAXES 571, 578 (1977).

122. *Id.* The excess cost would be deductible by "those who go to work from home more than once per day, or have two jobs, or have a job and go to school for work-related purposes." *Id.* "[T]hose who have a regular work location and go, instead, to a temporary work location" also would be able to deduct the excess cost. *Id.*

area.¹²³ This plan, however, makes no attempt to define the general work area. Furthermore, personal trips to the taxpayer's residence and back to work during the day apparently would be deductible. These trips might be for purposes of eating, resting, or returning to work to respond to an emergency. Because these trips are purely personal, the IRS and the courts should regard them as commuting.¹²⁴

VII. A SUGGESTED APPROACH FOR THE COURTS

Despite the problems that *Turner v. Commissioner* presents, the Tax Court probably will not overrule the holding. Only one judge on the court dissented,¹²⁵ and the court repeatedly has cited the opinion, albeit in dicta.¹²⁶ Furthermore, a majority of the full membership of the Tax Court is necessary to overrule existing precedent.¹²⁷

The conclusion in *Turner* that the transportation expenses of the taxpayer were not deductible is correct. *Turner* was attempting

123. *Cf. id.* at 579.

124. *Potenga v. Commissioner*, 35 T.C.M. (CCH) 687 (1976); *see* *Beltran v. Commissioner*, 43 T.C.M. (CCH) 892 (1982) (any leg of journey that begins or ends at residence constitutes commuting). No deduction is allowable for extra duty or emergency trips to the regular place of business. *O'Hare v. Commissioner*, 54 T.C. 874, 875 (1970); *Sheldon v. Commissioner*, 50 T.C. 24, 27 (1968); *Marot v. Commissioner*, 36 T.C. 238 (1961); *see also* *Arnold v. Commissioner*, 37 T.C.M. (CCH) 1847-94 (1978) (no deduction allowed urologist in traveling from residence to hospital or any other place to practice medicine); Letter Rul. 8014016 (Dec. 21, 1979) (emergency trips of pediatricians between residences and hospital to visit patients are nondeductible commuting expenses). *But see* *Sapp v. Commissioner*, 36 T.C. 852, 854-55 (1961) (physician allowed partial deduction for emergency house calls when at social engagements). In *Shea v. Commissioner*, 38 T.C.M. (CCH) 1178 (1979), the court said it has noted that expenses which a physician incurred in emergency or house calls to patients may be deductible. In *Bovington v. United States*, 41 A.F.T.R.2d 78-762 (D. Mont. 1977), the court permitted taxpayer to deduct daily transportation expenses incurred in practicing medicine except the estimated cost of one round trip between residence and office. In *Boerner v. Commissioner*, 30 T.C.M. (CCH) 240 (1971), the court allowed taxpayer a deduction for transportation expenses even though taxpayer stopped at his residence for lunch after attending work related classes at a nearby university and before going to his principal place of business. Rev. Rul. 55-109, 1955-1 C.B. 261, states that a taxpayer with two employers may deduct the cost of going to the second job despite a stop at the residence for dinner. Nevertheless, the deduction is permissible only to the extent that the cost does not exceed the expense that the taxpayer would have incurred if he had gone directly from the first job to the second one. *Id.* at 264. Conceptually, at least, trips from one job to the residence and from the residence to another job constitute commuting.

125. 56 T.C. 27, 33 (1971) (Quealy, J., dissenting).

126. *See, e.g.,* *Portillo v. Commissioner*, 44 T.C.M. (CCH) 1085 (1982); *Conte v. Commissioner*, 42 T.C.M. (CCH) 1296 (1981); *Harris v. Commissioner*, 39 T.C.M. (CCH) 1126 (1980); *McCallister v. Commissioner*, 70 T.C. 505 (1978); *Gurney v. Commissioner*, 30 T.C.M. (CCH) 1429 (1971).

127. H. DUBROFF, *supra* note 44, at 357.

to deduct commuting expenses; he merely traveled between his residence and places of work.¹²⁸ The difficulty that the opinion poses arises from its sweeping statements predicated on opaque analysis.¹²⁹ Nevertheless, on the strength of these statements the Tax Court has said that transportation expenses for daily trips to temporary work sites outside the regular area of employment are not deductible.¹³⁰

Instead of overruling *Turner*, the Tax Court has sought to accommodate the Commissioner and taxpayers by applying the temporary/indefinite test to determine the deductibility of transportation expenses for daily trips to distant work sites.¹³¹ The court in effect has ignored the *Turner* precedent. Moreover, when the Tax Court articulated the issue in temporary versus indefinite terms, Congress had not yet directed that the treatment of transportation costs between a taxpayer's residence and work place be determined without regard to Revenue Ruling 76-453 or any similar decision.¹³² The Tax Court probably will decide the daily transportation costs issue in classical terms for costs paid or incurred after the May 31, 1981, expiration date of the Congressional mandate.¹³³ Indeed, the *Norwood* procedure seems to be the only way that the Tax Court can extricate itself from *Turner* short of overruling the case. *Norwood* applied the two-prong test of Revenue Ruling 190.¹³⁴ To satisfy the first prong, the taxpayer's work at a distant site must be temporary.¹³⁵ According to the Tax Court, work is temporary if the taxpayer can expect it to last for only a short time.¹³⁶ To meet the

128. See *supra* text accompanying notes 30-36.

129. See *supra* text accompanying notes 38-51.

130. *Portillo v. Commissioner*, 44 T.C.M. (CCH) 1085 (1982); *Conte v. Commissioner*, 42 T.C.M. (CCH) 1296 (1981); *McCallister v. Commissioner*, 70 T.C. 505 (1978); see *supra* text accompanying notes 60-65 and accompanying text.

131. *McCallister v. Commissioner*, 70 T.C. 505, 508 (1978); *Norwood v. Commissioner*, 66 T.C. 467, 469 (1976). Recent cases in which the court adopted this approach include *Hazelton v. Commissioner*, 43 T.C.M. (CCH) 1287 (1982); *Fairey v. Commissioner*, 43 T.C.M. (CCH) 1169 (1982); *Faircloth v. Commissioner*, 43 T.C.M. (CCH) 1115 (1982). But see *Paolini v. Commissioner*, 43 T.C.M. (CCH) 513 (1982), *aff'd*, No. 82-3290 (3d. Cir. Jan. 17, 1983), discussed *infra* note 157.

132. Act of Oct. 7, 1978, Pub. L. No. 95-427, § 2, 92 Stat. 996; see *supra* text accompanying notes 22-24. The court filed the report for *Norwood* June 15, 1976. 66 T.C. at 467. The IRS had determined the deficiencies in *Norwood* for 1972 and 1973. *Id.* In *McCallister* the court filed the report June 19, 1978. 70 T.C. at 505. The IRS had determined the deficiencies for 1973. *Id.* at 506.

133. See *supra* notes 23-24 and accompanying text.

134. 1953-2 C.B. 303; see *Harris v. Commissioner*, 39 T.C.M. (CCH) 1126 (1980).

135. 1953-2 C.B. at 305.

136. *Norwood v. Commissioner*, 66 T.C. 467, 469 (quoting *Tucker v. Commissioner*, 55

second prong the work must have occurred outside the "general area" of the taxpayer's principal place of employment.¹³⁷

The Tax Court has discussed the boundaries of the general area only once. In *Harris v. Commissioner*¹³⁸ the court said that county lines surrounding a residence are not the outer limits of the general area of a taxpayer's principal place of employment. Consequently, a surveyor who worked at seven job sites in Los Angeles County, California, where he lived, could not deduct transportation expenses to three job sites in adjoining Orange County. The three Orange County locations were fifty to eighty-one miles from his residence. Writing for the Tax Court, Judge Goffe observed:

The fortuitous location of a county line does not limit the general area of a taxpayer's principal or regular place of employment, especially in cases, such as the present one, where petitioner's work takes him all over a far-flung metropolitan area. As a surveyor living in the Los Angeles metropolitan area, petitioner could expect to be employed anywhere within that general area. The crossing of a county line which bisects an otherwise integrated metropolitan area does not necessarily prove that petitioner has left the general area of his principal or regular place of employment. We hold that the general area of petitioner's principal or regular place of employment in 1973 was the Los Angeles metropolitan area.¹³⁹

The Ninth Circuit reversed the Tax Court's determination that the Orange County work sites were within the "general area" of taxpayer's principal place of employment.¹⁴⁰ Noting the Tax Court's failure to define the boundaries of the metropolitan area, the court found that the Orange County jobs were outside taxpayer's normal work area not only because they were in a different county from the one in which he lived and usually worked, but also

T.C. 783, 786 (1971)). One writer has observed: "The determination whether a job is temporary or of indefinite duration depends on the facts and circumstances of the particular case, and the determination is generally not clear-cut." Comment, *Travel, Transportation, and Commuting Expenses*, *supra* note 51, at 533.

137. Rev. Rul. 190, 1953-2 C.B. at 305.

138. 39 T.C.M. (CCH) 1126 (1980).

139. *Id.* at 1132. In *Schmidt v. Commissioner*, 36 T.C.M. (CCH) 1529 (1977), the Commissioner conceded that Mentone, California, a city in San Bernardino County, which is adjacent to Orange and Los Angeles Counties, was outside the Los Angeles metropolitan area. The metropolitan area constituted the principal place of employment for taxpayer, a millwright, who worked at approximately nine sites during the taxable year 1973. He worked for 15 days at the Mentone site, which was over 77 miles from his residence in Anaheim (Orange County). Writing for the court, Judge Wilbur stated that the employer's shop and taxpayer's residence were both located in the Los Angeles metropolitan area and that all the other job sites were located within the City of Los Angeles except one, which was on the city's outskirts in close proximity to Schmidt's residence. Judge Wilbur concluded that Rev. Rul. 190, 1953-2 C.B. 303, permitted taxpayer to deduct the expenses of traveling to and from Mentone since it was outside the Los Angeles metropolitan area. *Id.* at 1530.

140. *Harris v. Commissioner*, No. 80-7466 (9th Cir. May 13, 1982).

because they were a considerable distance from taxpayer's residence and outside the jurisdiction of his local union.¹⁴¹

The Tax Court in *Harris* stated that courts should not use a single county to define the metropolitan area.¹⁴² A county is a political unit,¹⁴³ with county seats and boundaries traditionally located to allow a person to travel by horse and carriage from his residence to the courthouse and back again between sunrise and sunset.¹⁴⁴ Today, because of improved transportation, daily travel over significant distances is common. As a result, the use of the county to define a taxpayer's metropolitan area is anachronistic and out of step with economic reality.¹⁴⁵ The Tax Court was indeed correct in refusing to use county lines to delimit the metropolitan area.

The federal government has identified metropolitan areas using concentrations of urban development with close internal commuting ties and weak relationships with other areas.¹⁴⁶ The government has designated more than 320 areas of the country Standard Metropolitan Statistical Areas (SMSAs).¹⁴⁷ The Los Angeles SMSA encompasses only Los Angeles County. Therefore, if the Tax Court in *Harris* had used the SMSA system to identify the metropolitan area, the court would have concluded that taxpayer's transportation expenses to and from Orange County were

141. Whether in future cases the Ninth Circuit would examine all three elements, or perhaps only one or two in defining a taxpayer's work area, is impossible to determine from the opinion. The court might consider only the boundaries of a local union. This approach, however, raises two problems. First, the boundaries would not apply to nonunion activities. Second, the boundaries of a local union may not encompass a functionally interrelated economic area and, hence, may be unsuitable as even a limited solution to the problem of defining a metropolitan area. See *infra* text accompanying notes 146-55.

142. *Harris v. Commissioner*, 39 T.C.M. (CCH) at 1132.

143. A. HAWLEY, *HUMAN ECOLOGY* 258 (1950).

144. A. BROMAGE, *AMERICAN COUNTY GOVERNMENT* 196 (1933).

145. *Id.* at 267. See also W. ANDERSON, *THE UNITS OF GOVERNMENT IN THE UNITED STATES* 39 (1942) (explanation and development of local governmental units).

146. Federal Comm. on Standard Metropolitan Statistical Areas, *Documents Relating to the Metropolitan Statistical Area Classification for the 1980's*, 80-11 STATISTICAL REP. 335, 349 (1980) [hereinafter cited as *Documents*].

147. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, SUPPLEMENTARY REPORTS, STANDARD METROPOLITAN STATISTICAL AREAS AND STANDARD CONSOLIDATED STATISTICAL AREAS: 1980, at 1 (1981). The terminology recently has changed to Consolidated Metropolitan Statistical Areas (CMSAs), Primary Metropolitan Statistical Areas (PMSAs), and Metropolitan Statistical Areas (MSAs). CMSAs are groups of contiguous Standard Metropolitan Statistical Areas (SMSAs). SMSAs within CMSAs are PMSAs, and SMSAs elsewhere are MSAs. See *Wall St. J.*, Oct. 12, 1982, at 35, col. 1. For a discussion of these areas, see *Documents*, *supra* note 146; Notice, 45 Fed. Reg. 956 (1980).

deductible.¹⁴⁸

The Bureau of Economic Analysis (BEA) of the United States Department of Commerce has devised a somewhat different system for identifying metropolitan areas. The BEA has divided the nation into more than 180 areas based primarily on journey-to-work data from the Census of Population, newspaper circulation data, and county commuting data developed from Social Security Administration and IRS records.¹⁴⁹ The BEA Economic Area for Los Angeles, California, encompasses not only Los Angeles County but also eight other counties, including Orange County. If the Tax Court in *Harris* had used the BEA Economic Area for Los Angeles to define the metropolitan area, the court would have concluded that taxpayer failed to satisfy the second prong of Revenue Ruling 190.¹⁵⁰

Unlike the SMSA system, the BEA system is suitable for identifying metropolitan areas that constitute principal places of business within the meaning of Revenue Ruling 190. SMSAs cover less than one-fifth of the country and fail to account for one-fourth of the population.¹⁵¹ Presumably, taxpayers who do not live within SMSAs could not satisfy the second prong of the test under Revenue Ruling 190. Moreover, two experts have questioned whether SMSAs accurately define functionally interrelated areas.¹⁵² BEA Economic Areas, on the other hand, have several advantages. First, since they completely cover the country, no gaps exist. Second, the BEA Economic Areas are not likely to change significantly.¹⁵³

148. Although the following reports of the Tax Court do not discuss the definition of metropolitan area, they contain descriptions of metropolitan areas that approximate SMSAs: *Dady v. Commissioner*, 42 T.C.M. (CCH) 781, 785 (1981); *Smith v. Commissioner*, 36 T.C.M. (CCH) 1081, 1081 (1977); *Boerner v. Commissioner*, 30 T.C.M. (CCH) 240, 241 (1971); *Havens Structural Steel Co. v. Commissioner*, 30 T.C. 1121, 1122 (1958).

149. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, BEA ECONOMIC AREAS 1 (rev. 1977).

150. 1953-2 C.B. 303. Although the following reports of the Tax Court do not discuss the definition of metropolitan area, they do contain descriptions of metropolitan areas that approximate BEA Economic Areas: *Lieb v. Commissioner*, 33 T.C.M. (CCH) 1231, 1233 (1974); *Hoffman, v. Commissioner*, 48 T.C. 176, 176 (1967); *Armstrong v. War Contracts Price Adjustment Bd.*, 15 T.C. 625, 626 (1950).

151. BUREAU OF THE CENSUS, *supra* note 147, at 1.

152. See B. BERRY & J. KASARDA, CONTEMPORARY URBAN ECOLOGY 164 (1977) (quoted *infra* note 155).

153. *Id.* at 285, 287. The Bureau of Economic Analysis will review 1980 Census commuting data and a work-history sample based on Social Security data and revise the BEA Economic Area boundaries if necessary. Any changes will become effective after 1984 or 1985 to maintain continuity. Telephone interview with Edward A. Trott, Jr., Assistant to the Chief, Regional Economic Analysis Div., Bureau of Economic Analysis, U.S. Dep't of

Hence, the BEA system is more stable and over time should foster more consistent treatment of taxpayers within the same area. Third, the BEA has drawn the boundaries of its Economic Areas to encompass both the places-of-residence and the places-of-work of the labor force, including construction workers.¹⁵⁴ The boundaries under the SMSA system are restrictive and artificial by comparison,¹⁵⁵ especially for the purposes of Revenue Ruling 190.

As a cautious measure, taxpayers should seek refunds and litigate before the district courts rather than the Tax Court to deduct daily transportation expenses. In view of the Tax Court's statements that *Turner* precludes a deduction for daily transportation expenses to and from distant temporary work sites,¹⁵⁶ the court may disregard *Norwood* and apply *Turner*.¹⁵⁷ The Fifth,¹⁵⁸ Seventh,¹⁵⁹ Eighth,¹⁶⁰ and Ninth¹⁶¹ Circuits have applied the tempo-

Commerce (Oct. 13, 1982).

154. Regional Economic Analysis Div., Bureau of Economic Analysis, U.S. Dep't of Commerce, *The BEA Economic Areas: Structural Changes and Growth, 1950-73*, 55 SURV. CURRENT BUS. 14, 15 (1975).

155. Two experts have criticized the SMSA system as follows:

1. The areas economically and socially integrated with the central cities are far more extensive than the formal boundaries of SMSAs.
2. In the least densely populated parts of the nation's settled areas, regionally important commuting fields gravitate around urban centers of less than fifty thousand people. [Generally, a city of at least 50,000 has been required for a metropolitan area designation under the SMSA system. This requirement was relaxed somewhat to permit areas to be defined around smaller cities when specified conditions were met. See *Documents, supra* note 146, at 339.]
3. At the other extreme, particularly in the manufacturing belt, labor markets overlap in elaborate ways. The urban regions of the "megalopolises" are highly complex, multicentered entities.

B. BERRY & J. KASARDA, *supra* note 152, at 164 (1977).

The boundaries under the SMSA system appear to have their basis in part on subjective notions that metropolitan areas ought to be urban, rather than rural, in character, with large concentrations of population. See *Documents, supra* note 146 at 350.

156. See *supra* note 130 and accompanying text.

157. In *Paolini v. Commissioner*, 43 T.C.M. (CCH) 513 (1982), *aff'd*, No. 82-3290 (3d Cir. Jan. 17, 1983), the Tax Court took precisely that action. The court held that for 1975, 1976, and 1977 automobile expenses for daily transportation between a construction supervisor's apartment, where he lived during the week away from his family, and work sites were not deductible. The court observed that although it previously had consented to decide similar cases on the basis of Revenue Ruling 190 "if both parties so framed the issues," in *Paolini* the court agreed with the Commissioner's contention "that petitioner's daily trips to and from clearly temporary job sites [were] nondeductible commuting expenses." 43 T.C.M. (CCH) at 517. The court failed to realize that Revenue Ruling 190 was inapplicable because *Paolini* was not going to work outside the area of his principal place of business. He simply was commuting to and from his principal and only places of work. Hence, the court's overbroad application of *Turner* was not necessary to decide the case.

158. *Boone v. United States*, 482 F.2d 417 (5th Cir. 1973).

159. *Kasun v. United States*, 671 F.2d 1059 (7th Cir. 1982).

rary/indefinite test to decide whether these expenses are deductible. The position that these circuits have taken is sound,¹⁶² and other circuits probably would adopt the same approach.

VIII. A SUGGESTED APPROACH FOR THE IRS

The IRS should not attempt to follow the sweeping statements of the Tax Court in *Turner*. Rather, it should limit the holding to the facts of the case. The efforts of the IRS to follow *Turner* in Revenue Ruling 76-453 evoked public outcry¹⁶³ and congressional reaction.¹⁶⁴ Moreover, *Turner* has led the IRS to treat inconsistently taxpayers who travel to distant temporary work sites.¹⁶⁵ The IRS should develop the position set forth in Revenue Ruling 190, which articulated a reasonable interpretation of the deductibility of daily transportation expenses to and from distant temporary work sites. Revenue Ruling 190, however, neglected to define the terms "metropolitan area" and "temporary," to explain how to ascertain the metropolitan area of regular employment, or to identify precisely which expenses are deductible.

The shortcomings of Revenue Ruling 190 are remediable. First, according to the revenue ruling, daily transportation expenses between the metropolitan area in which workers ordinarily work and a distant project where they are employed for a temporary period are deductible.¹⁶⁶ The IRS should define metropolitan areas as BEA Economic Areas.¹⁶⁷ Second, the IRS may explain "temporary" by resorting to the discussion in Revenue Ruling 60-189. This definition has the advantage of its long-standing existence and use. The revenue ruling indicates that the IRS will treat employment at a given location as temporary if both the anticipated and the actual duration of employment is less than one year. Employment of anticipated or actual duration of a year or more at a particular location creates a presumption that the taxpayer's presence there is not temporary.¹⁶⁸ Third, in most instances, the taxpayer's area of regular employment is clear. When the area is in

160. *Frederick v. United States*, 603 F.2d 1292 (8th Cir. 1979).

161. *Neal v. Commissioner*, 681 F.2d 1157 (9th Cir. 1982).

162. See *supra* text accompanying notes 67-76.

163. See *supra* note 95 and accompanying text.

164. See *supra* notes 22-27 and accompanying text.

165. See *supra* text accompanying notes 88-95.

166. Rev. Rul. 190, 1953-2 C.B. at 305.

167. See *supra* text accompanying notes 149-54.

168. Rev. Rul. 60-189, 1960-1 C.B. at 63-64; see Rev. Rul. 74-291, 1974-1 C.B. 42.

dispute, however, the IRS should apply the criteria that the courts have used to determine the principal place of business of a taxpayer who works at two distant sites and seeks to deduct meal and lodging costs at one of them under section 162(a)(2). These criteria include total time ordinarily spent at each place, the degree of business activity at each place, and income that the taxpayer derived from each place.¹⁶⁹

Last, Revenue Ruling 190 fails to explain whether all or only part of the daily transportation expenses are deductible when a taxpayer travels to a work site located at a distance from the metropolitan area where he regularly works. Two statements in the ruling suggest that only the excess expenses—expenses for transportation outside the metropolitan area—are deductible.¹⁷⁰ This view is the correct approach. During travel within the metropolitan area, the taxpayer is a commuter, but outside the area the taxpayer is not commuting¹⁷¹ because the transportation actually is from one place of business to another place of business. Of course, all transportation expenses for trips outside the metropolitan area could be deductible under a *de minimis* rule.¹⁷² For a taxpayer who goes outside the metropolitan area, however, application of the *de minimis* rule should depend on the total distance the taxpayer travels each day compared with the distance he travels outside the metropolitan area. The IRS also would have to examine the size of the area, the normal commuting distance, and the location of the taxpayer's residence within the area. The IRS should not apply a *de minimis* rule in the context of Revenue Ruling 190 because of

169. See, e.g., *Folkman v. United States*, 615 F.2d 493 (9th Cir. 1980); *Markey v. Commissioner*, 490 F.2d 1249 (6th Cir. 1974); *Montgomery v. Commissioner*, 64 T.C. 175 (1975), *aff'd*, 532 F.2d 1088 (6th Cir. 1976).

170. Revenue Ruling 190 refers to expenses for daily transportation between the metropolitan area and the temporary work site as "necessarily incurred for business reasons." 1953-2 C.B. at 305. After indicating that the IRS will consider the principal or regular place of employment as the metropolitan area in which a construction worker lives and customarily carries on his trade, the revenue ruling says that the worker may deduct "his actual expenses incurred for daily transportation between his principal or regular place of employment and such job . . ." *Id.* In *Schmidt v. Commissioner*, 36 T.C.M. (CCH) 1529 (1977), however, the government conceded that the entire cost of transportation between the taxpayer's residence and a temporary site outside the normal work area was deductible.

171. See, e.g., *Steinhort v. Commissioner*, 335 F.2d 496 (5th Cir. 1964); *Adelberg v. Commissioner*, 30 T.C.M. (CCH) 68 (1971); Rev. Rul. 55-109, 1955-1 C.B. 261; Letter Rul. 8023052 (Mar. 12, 1980); see also *Curphey v. Commissioner*, 73 T.C. 766, 778 (1980) (local transportation expenses between principal place of business and another business location motivated by purely business reasons are deductible), *appeal dismissed*, No. 80-7678 (9th Cir. Feb. 22, 1982).

172. See *supra* text accompanying note 93.

the potential complexities of administration.

IX. CONCLUSION

The IRS and the courts best can resolve the issue of the deductibility of daily transportation expenses to and from distant temporary work sites through application of the temporary/indefinite test together with the rationale of Revenue Ruling 190. This result well may have been what Congress desired when it prohibited the application of Revenue Ruling 76-453 or any decision reaching the same or a similar result.¹⁷³ Refinement of Revenue Ruling 190 is necessary and possible with minimal disruption to existing interpretations of either Revenue Ruling 190 or the temporary/indefinite test. The result not only should facilitate consistent application of section 162(a) of the Internal Revenue Code of 1954 but also should foster substantial fairness for all taxpayers who must travel in the performance of their work.

173. See *supra* text accompanying note 22.