IT 112 - Deductibility of travelling expenses between residence and place of employment or business

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TAXATION RULING NO. IT 112

THE DEDUCTIBILITY OF TRAVELLING EXPENSES BETWEEN RESIDENCE AND PLACE OF EMPLOYMENT OR BUSINESS

F.O.I. EMBARGO: May be released

REF H.O. REF: J35/194/2 F174

B.O. REF: DATE ORIG. MEMO ISSUED: 19.11.79

F.O.I. INDEX DETAIL REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1101128	TRAVELLING EXPENSES TRAVEL BETWEEN RESIDENCE AND WORK	51(1)

OTHER RULINGS ON TOPIC: IT 113,117

PREAMBLE Decisions of the Supreme Court in FC of T v Vogt 75 ATC 4073, 5 ATR 274; FC of T v Collings 76 ATC 4254, 6 ATR 476, FC of T v Ballesty 77 ATC 4181, 7 ATR 411 and FC of T v Weiner 78 ATC 4006, 8 ATR 335 necessitated a review of the manner in which expenses incurred by taxpayers in travelling between their place of residence and place of employment or business should be treated for income tax purposes.

FACTS 2. The decision of the Full Court of the High Court in the appeals of Lunney and Hayley v FC of T (1958) 100 CLR 478 affirmed a long-standing line of decisions that fares paid by taxpayers to enable them to go day by day to their regular place of employment or business and back to their home are not deductible against the assessable income earned by them from their employment or business.

3. In Lunney and Hayley the taxpayers were a ship's joiner and a dentist respectively. Neither taxpayer carried on income-producing activities at his home. Lunney had only one employment and he reported at the commencement and completion of each day's work to his employer's office at the waterfront from which he travelled (at his employer's expense) to various parts of the port of Sydney to carry out his work. He travelled daily by bus from his suburban residence to the city to report for work and to return home after work. Hayley carried on his profession from rooms in the city of Sydney and he travelled daily by train from his suburban residence to the city and return to pursue his professional practice.

4. Dixon C.J., Williams, Kitto and Taylor JJ. (with McTiernan J. dissenting) decided that the fares in each instance were not deductible under s.51. Williams, Kitto and Taylor JJ. said, at pages 498 and 499 -

> "It is, of course, beyond question that unless an employee attends at his place of employment he will not derive assessable income and, in one sense, he makes

> the journey to his place of employment in order that he may earn his income. But to say that expenditure on fares is a prerequisite to the earning of a taxpayer's income is not to say that such expenditure is incurred in or in the course of gaining or producing his income. Whether or not it should be so characterised depends upon considerations which are concerned more with the essential character of the expenditure itself than with the fact that unless it is incurred an employee or a person pursuing a professional practice will not even begin to engage in these activities from which their respective incomes are derived."

5. In Lunney's case their Honours took the view that the expenditures were properly characterised as personal or living expenses rather than business expenses or expenses incurred in, or in the course of, earning assessable income. They said, at page 501 -

> "Expenditure of this character is not by any process of reasoning a business expense; indeed, it possesses no attribute whatever capable of giving it the colour of a business expense. Nor can it be said to be incurred in gaining or producing a taxpayer's assessable income or incurred in carrying on a business for the purpose of gaining or producing his income; at the most, it may be said to be a necessary consequence of living in one place and working in another. And even if it were possible - and we think it is not - to say that its essential purpose is to enable a taxpayer to derive his assessable income there would still be no warrant for saying, in the language of s.51, that it was 'incurred in gaining or producing the assessable income' or 'necessarily incurred in carrying on a business for the purpose of gaining or producing such income.'"

6. Since the decision in Lunney and Hayley, the Supreme Courts have tended, on occasions, to take a somewhat more liberal view of the application of section 51(1) to expenses incurred in travelling to and from work.

7. In Vogt a professional musician was allowed deductions for motor vehicle expenses incurred by him in travelling between his place of residence and the various places at which he performed. Waddell J. in the Supreme Court of New South Wales held that the essential character of the expenditure was such that it should be regarded as having been "incurred in gaining or producing the assessable income".

8. Waddell J. considered that the first step in determining whether the expenditure was deductible under section 51 was to state the relevant aspects of the operations carried on by the taxpayer for the production of his income. These were that he earned his income by performing at several places, on musical instruments and associated equipment on terms that he brought the instruments and equipment to the place of performance; the instruments and equipment were of substantial

value; they were of a bulk which meant they could be transported conveniently only by the use of a motor vehicle; the taxpayer kept the instruments and equipment at his residence for justifiable reasons of convenience and for the purposes of practising on them.

9. The next step his Honour took was to determine what was the essential character of the expenditure itself. Waddell J. thought three matters were relevant to this character:-

(a) The expenditure was incurred as part of the operations by which the taxpayer earned his income.

(b) It was essential to the carrying on of those operations; there was no other practicable way of getting his instruments to the places where he was to perform.

(c) In a practical sense, the expenditure should be attributed to the carriage of the taxpayer's instruments rather than to his travel to the places of performance. The mode of his travel was simply a consequence of the means which he employed to get his instruments to the place of performance, that is by carrying them in the motor vehicle which he drove.

10. A matter which apparently weighed heavily in his Honour's mind was that the expenditure arose from, or could be attributed to, the necessity of getting the instruments and associated equipment to the place of performance. This clearly emerges from certain dicta by Waddell J. in relation to the expense of a violinist travelling from his residence to the place of performance where he takes with him his violin which he keeps at home for safe keeping and for the purpose of practising (75 ATC at page 4078; 5 ATR at page 279. His Honour thought that such an expense was clearly not deductible. He recognised, however, that cases may well arise where, as a matter of fact, the size and bulk of an instrument or the reasons for keeping it at home may make it difficult to determine whether expenditure incurred in circumstances similar to that case is deductible.

11. In Collings a highly trained computer consultant whose employment required her to be on call 24 hours a day was allowed a deduction for motor vehicle expenses incurred by her in travelling between home and work solely outside the normal daily journeys to and from work. The taxpayer was involved in supervising a major conversion in the computer facilities which her employer provided for its customers. In order to assist in diagnosing and correcting computer faults while at home, she was provided by her employer with a portable terminal which connected to the computer through the telephone line. In accordance with the terms of her employment, she used the terminal at home in the performance of her duties. If she could not resolve the problem over the telephone, she would return to the office in order to get the computer working. Rath J. in the

Supreme Court of New South Wales held that the expenses in respect of her travelling between her home and work outside the normal daily journey were, to use his Honour's words, "in the special circumstances of this case" outgoings incurred in gaining or producing her assessable income, and were not of a private or domestic nature and were accordingly allowable deductions under section 51.

12. Rath J. stated that the abnormal journeys to and from home were made necessary by the very nature of the employment and of the taxpayer's duties. The taxpayer had a very special employment. She was not really in a position similar to those employees who have to be on stand-by duty at their homes and are required to obey a summons to cope with some emergency. She was engaged on a special assignment and was continuously on duty wherever she was. The taxpayer was not choosing to do part of the work of her job in two separate places; unless she were to spend all her time in the office with the computer, she must have more than one place of work. The two places of work are a necessary obligation arising from the nature of her special duties. When called at her home, the taxpayer immediately had the responsibility of correcting the malfunction in the computer. She might there and then diagnose the trouble, and provide the remedy; or she might decide that she would have to make the journey to the office, and if she took this course she was during the journey on duty in regard to the particular problem that had arisen.

13. In Ballesty the taxpayer was employed full-time as a purchasing officer by a social club and was also a part-time professional rugby league player. Under an agreement made between the taxpayer and his employer he was bound "to the best of his ability and skill to play the game of Rugby League football for the club in any team and in any grade as to when and where he may be from time to time called on by the said club so to do" and to keep himself in the best possible condition and to carry out the training and other instructions of the club through its responsible officials. The issue in the appeal was the deductibility of car expenses in travelling (1) from training sessions at the employer club's home ground to his home, and (2) from his home to matches played on the club's home ground and return travel to his home after the match.

14. Waddell J. in the Supreme Court of New South Wales held that the travel expenses were deductible under section 51. His Honour said that the question is what is the essential character of the expenditure itself; can it be said that the occasion of the expenditure is to be found in the activities of the taxpayer which were productive of the income in question?

15. It was argued for the taxpayer that there are two ways in which it could be said that the occasion of the expenditure may be found in his income-producing activities. Waddell J. accepted both submissions. First, the practical necessity of travelling by motor vehicle to and from matches and training in order for the taxpayer to produce his best form. The occasion of the expenditure was the necessity to comply with the terms of

his contract and to fit himself to make the best contribution he could to the winning of the match or to the success of the training sessions to or from which he was travelling. In considering the practical necessity of travelling by motor vehicle, Waddell J. took into account the practical reasons advanced by the taxpayer in evidence, namely, the carriage of football gear, its weight, certain temperamental factors, length of time required to travel and avoiding contact with other people.

16. Secondly, Waddell J. took the view that the taxpayer travelled from his home as a base of operations to the various places he was required to go pursuant to his contract. His Honour said (77 ATC at page 4185; 7 ATR at page 415).

> "Here the occasion of the expenditure is in travelling to a variety of places as required from time to time under the contract by the performance of which the taxpayer earned the assessable income ..... Although I do not find it an easy question to resolve, I think that on the whole the taxpayer should be regarded as having embarked upon the activities by which he earned the assessable income when he left his home to travel either to a match or to training and as continuing in those activities on his journey home. In this sense his place of residence should be regarded as his base of operations. If this view is correct, as I think it is, the occasion of the expenditures in question are to be found in an activity which is productive of the assessable income."

17. In addition, the Commissioner regarded expenditure on travel between Ballesty's regular place of work and training sessions and to and from "away" matches as deductible and Waddell J. took the view that no distinction should be drawn between these allowable expenditures and those disallowed by the Commissioner.

18. In Wiener a deduction was allowed for certain motor vehicle expenses in travelling in connection with the pursuit by the taxpayer of her vocation as a school teacher employed by the Education Department of Western Australia. The taxpayer was engaged in a pilot scheme teaching foreign languages to primary students and she was allocated as part of her normal teaching duties the task of instructing pupils at five different schools. It was not practical to commute between these schools by public transport. The paper work involved in developing the teaching programme necessitated a study to be maintained at her home set apart exclusively for her teaching work. Deductions were allowed for various expenses in relation to this study. It was not disputed that expenses incurred in travelling between schools were deductible and the issue in the appeal was the deductibility of the cost of travelling between her home to the first school of each day and between the last school on each day and her home.

19. Smith J. in the Supreme Court of Western Australia held

that it was not open to challenge that travel was a fundamental part of the taxpayer's work; the taxpayer would not have been able to perform her duties without the use of her motor vehicle. On four of the five working days the taxpayer's contract of employment required her to teach at not less than four different schools and to comply with an exacting timetable which kept her on the move throughout each of those days. The nature of the job itself made travel in the performance of its duties essential and it was a necessary element of the employment that on those working days transport be available at whichever school the taxpayer commenced her teaching duties and that transport remained at her disposal throughout each of those days. It appeared to have been tacitly understood that she would provide her own means of transport as she was paid an allowance by her employer for the use of her motor vehicle in travelling between schools. Smith J. took the view that the travelling expenses claimed by the taxpayer fell within the category of travelling expenses referred to in Taylor v. Provan (1975) AC 194 (per Lord Simon of Glaisdale at p.221) where the office or employment is of itself inherently an itinerant one, and that the taxpayer may be said to be travelling in the performance of her duties from the moment of leaving home to the moment of return there.

20. Subsequent to the Wiener decision, Smith J. considered the case of a magistrate who used his car on occasions in the course of his employment. However, his Honour was able to distinguish the circumstances in this case (Burton v FC of T, 79 ATC 4318; 9 ATR 930) from those in Wiener's, finding that the travel to other courts was not of such a frequency that one was led to the conclusion that the office was essentially an itinerant one.

RULING

21. From this review of authorities, the following guidelines are considered to have emerged:-

(a) cases comparable with Lunney and Hayley;

(i) In the case of the great majority of employees and of people pursuing a profession or other ordinary vocation, expenses of travelling - whether by public transport or by use of their own motor vehicles - in habitually going from home to a regular place of employment or business are not deductible. No general change in the settled approach is warranted to the longstanding line of decisions that the essential character of the expenditure in such cases is a personal or living expense rather than an expense incurred in, or in the course of, gaining assessable income. These journeys are made by such a taxpayer on the way to his employment and in returning from it. They are not made in the course of his employment or in the performance of his duties.

(ii) In the case of a taxpayer whose employment requires him to be on stand-by duty at home, the deductibility of expenditure in travelling from home to a place of work is a question of fact to be decided according to the circumstances of each case. For example, the mere fact that an airline pilot is on stand-by duty at home is not enough. However, a medical practitioner who holds an appointment at a hospital and is required by the terms of his appointment to be accessible by telephone to cope with emergency cases; and who gives instructions to the hospital staff by telephone before setting out to travel to the hospital, may incur deductible expenses in travelling to and from the hospital where it is demonstrable that his responsibility for a patient begins at home as soon as he receives a telephone call and he might properly be regarded as having commenced his duties at home on receiving the call. cf. Owen v. Pook (1970) AC 244.

(b) cases comparable with Vogt:

Expenditure on travelling may be accepted as having the essential character of expenditure incurred in gaining or producing the assessable income of a taxpayer in the relevant sense where:-

(i) the relevant aspects of the operations carried on by the taxpayer for the production of his income are closely comparable with those in Vogt, namely, income is earned by performing his duties at several places by using his own equipment which he brings to the place of performance; the equipment is of substantial value and of such bulk that it can only be conveniently transported by the use of a motor vehicle; and, there are justifiable reasons for the taxpayer to keep the equipment at home; and

(ii) the essential character of the expenditure itself is such that the expenditure is incurred as part of the operations by which the taxpayer earns his income; there is no other practicable way of getting his equipment to the places where he is to perform; and, the expenditure may be attributed to the carriage of the equipment rather than to his travel to the place of performance.

(c) cases comparable with Collings:

(i) Although it is not anticipated that the same circumstances present in this case will arise very often in other cases, expenditure on travelling between a taxpayer's home and his work, outside the normal daily journey, may be allowed where the facts are comparable with the special circumstances which arose in Collings. The journeys to and from home were made necessary by the special nature of the taxpayer's employment whereby she was engaged on a special assignment and was continuously on duty wherever she was. She was not choosing to do part of the work of her job in two separate places; the two places of work were a necessary obligation arising from the nature of her special duties.

(ii) A distinction was drawn between the facts of this case and the position of employees who have to be on stand-by duty at their homes and who are required to obey a summons to cope with some emergency. As to such stand-by employees, see paragraph 21(a)(ii) above.

(d) cases comparable with Ballesty:

Expenditure on travelling by motor vehicle may be accepted as having the essential character of expenditure incurred in gaining or producing the assessable income of a taxpayer engaging in high level sporting activity in the relevant sense where:-

(i) the relevant aspects of the operations carried on by the taxpayer for the production of his income and the essential character of the expenditure itself are very comparable with those in Ballesty, namely, income is earned by performing his duties at more than one place in suitable sporting gear; there is a practical necessity of travelling by motor vehicle to and from sporting events and training in order for the taxpayer to produce his best form; and, the occasion of the expenditure is the necessity to comply with the terms of a contract entered into by the taxpayer with his employer providing a continuing obligation to do everything necessary to get and keep himself in the best possible condition so as to render the most efficient service to his employer. The

taxpayer must be under a contractual obligation to travel to and from sporting events and training in a way which would enable him to perform at his best. In considering the practical necessity of travelling by motor vehicle, consideration should be given to the carriage of sporting gear, its weight, any temperamental factors comparable with those in Ballesty, the length of time required to travel and any necessity to avoid contact with the general public; and

(ii) the taxpayer must travel from his home as a base of operations to the various places he was required to go in accordance with a contract of employment with his employer so that the taxpayer may properly be regarded as having embarked on the activities by which he earned his assessable income when he leaves his home to travel either to a sporting event or to training and as continuing in those activities on his journey home.

(iii) whether expenditure on travel between the taxpayer's regular place of employment or business and training sessions and to and from "away" sporting events are properly deductible is also a relevant consideration in determining whether expenditure on travel from his home to and from "home" sporting events or training are allowable.

(e) cases comparable with Wiener:

Expenditure on travelling may be accepted as having the essential character of expenditure incurred in gaining or producing the assessable income of a taxpayer in the relevant sense where the office or employment of the taxpayer is precisely the same as that in Wiener, namely, it is inherently of an itinerant nature; travel must be a fundamental part of the taxpayer's work; the taxpayer must not be able to perform his duties without the use of a motor vehicle; the taxpayer's contract of employment must require him to perform his duties at more than one place of employment; the nature of the job itself must make travel in the performance of its duties essential; and, it must be able to be said of the taxpayer that he is travelling in the performance of his duties from the time of leaving home.

22. The guidelines outlined in paragraph 21 above are not intended to be an exhaustive statement of the principles to be

applied to all cases likely to arise in relation to travelling expenses between a taxpayer's residence and his place of employment or business but merely a statement of the principles which are considered to have emerged from the decided cases in relation to this matter. Essentially, as recognised by Dr Gerber in 79 ATC Case L49, 23 CTBR(NS) Case 56 (one of the "air pilot" cases), the Supreme Court decisions have been decided on their own peculiar facts and they should be followed in other cases only where similar circumstances obtain. They should not be regarded as altering existing policy in the normal case of travel between home and employment.

COMMISSIONER OF TAXATION