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Federal Income Taxation: The Commissioner's "Sleep or Rest" Interpretation's Sustained

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to their own criminal procedure. The problem is that the Supreme Court has not left much room for deviation from the principles laid down. One question which might arise is whether or not the decision should be applied retrospectively. It is doubtful that the question will be answered in the affirmative because this decision is of the type which affects only a police procedure which was considered acceptable before the decision.[34] The only other question which seems to be left open is whether or not the decision should be limited to its facts—to the situation in which an accused has been indicted and has retained counsel before he is placed in a lineup. The foregoing discussion and a recognition that the Supreme Court is telling state courts and law enforcement agencies to be aware of and to avoid techniques of identification which may be suggestive should provide an answer to that question.[35]

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Federal Income Taxation: the Commissioner's "Sleep or Rest" Interpretation Sustained: In United States v. Correll,[1] the Supreme Court held that a taxpayer on a business trip may "deduct the cost of his meals only if his trip requires him to stop for sleep or rest."[2] This decision has effected a renaissance of the Treasury's interpretation, which had previously endured judicial hostility from the Sixth[3] and Eighth Circuits,[4] and the Tax Court,[5] while receiving favorable treatment from the First Circuit.[6]

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[34] This is the reasoning of the Wisconsin Supreme Court in cases concerning a rule of federal constitutional law the only effect of which is to strike down a police procedure acceptable at the time of trial. State *ex. rel.* LaFollette v. Raskin, 30 Wis.2d 39, 139 N.W.2d 667 (1966). *See also*, Riemers v. State, 31 Wis.2d 457, 466, 143 N.W.2d 525, 530 (1966) (*Miranda* and *Escobedo* not to be applied retrospectively in Wisconsin).

[35] The Wisconsin Supreme Court has clearly limited *Escobedo* to its facts and seems to take a narrower attitude toward the right to counsel than does the United States Supreme Court. Holloway v. State, 32 Wis.2d 559, 563-565, 146 N.W.2d 441, 443-444 (1966); State v. Burnett, 30 Wis.2d 375, 383-384, 141 N.W.2d 221, 225 (1966); Browne v. State, 24 Wis.2d 491, 511f-g, 131 N.W.2d 169, 171-72 (1964). Nevertheless, it is difficult to understand how the Wisconsin court could narrowly interpret *Wade*.

[1] United States v. Correll, 88 S.Ct. 445 (1967).

[2] *Id.* at 445.

[3] Correll v. United States, 369 F.2d 87 (6th Cir. 1966), where the Court held "the Commissioner's overnight or sleep or rest rule, bears no rational relation to the business necessity of the meal expenses". *Id.* at 89.

[4] Hanson v. Commissioner, 289 F.2d 391 (9th Cir. 1962), where the Court erroneously relied on Williams v. Patterson, Note 16 *infra*, to allow a deduction where the taxpayer did not obtain sleep or rest.

[5] William v. Bagley, 46 T.C. 176 (1966), where the Tax Court abandoned the previously strict adherence to the overnight rule as the sole criteria of determining the business travel deduction.

[6] Commissioner v. Bagley, 374 F.2d 204 (1st Cir. 1967), where the court held "that fairness to the greatest number of people, and at the same time a practical administrative approach which will not permit every meal-purchasing taxpayer to take pot lunch in the courts, is to accept the Commissioner's Sleep or Rest Rule." *Id.* at 207.

Homer Correll, a grocery salesman making daily trips for his employer throughout eastern Tennessee, attempted to deduct the cost of his meals on these one-day trips as reimbursed travel expenses. The issue presented to the Court was whether or not the taxpayer had incurred the type of expense that falls within the scope of Section 162(a)(2)[7] of the Internal Revenue Code, which allows a deduction for travel expenses including the cost of meals and lodging incurred "while away from home in pursuit of a trade or business."[8] The Treasury has consistently construed this provision to apply only to trips where it was necessary for the taxpayer to obtain "sleep or rest". This interpretation dates back to a 1940 ruling[9] which construed the words "while away from home" in Section 23(a)(1)(A)[10] of the 1939 Internal Revenue Code to include railroad employees "who are required to remain at an away-from-home terminal in order to obtain necessary rest prior to making a further run or beginning a return run."[11] The rest period contemplated by the Treasury does not encompass the turn around situation where the taxpayer on a one-day trip is released simply to obtain a meal before the return trip.[12] In handling these turn-around cases, the Treasury attempted to distinguish them from those cases where the taxpayer was released to obtain sleep or rest by designating the latter as "overnight" cases.[13] Unfortunately, the term "overnight" was somewhat misleading because the Treasury clearly stated in a 1954 ruling that it did not require the taxpayer to be away from home for an "entire twenty-four hour period or from dusk till dawn."[14] Thus, a taxpayer who left home at 2:30 a.m. and who was later released for necessary rest before his return home at 6:00 p.m. could deduct his meal expenses.[15] Since the Commissioner used the terms "overnight" and "sleep or rest" interchangeably, it cannot be asserted that he abandoned his 1940 ruling. One major question left unanswered by the 1954 ruling was whether or not "necessary sleep" contemplated only those situations where the taxpayer was ordered by his employer to obtain rest. The Treasury responded to this question by acquiescing[16] to the decision in *Williams v. Patterson*[17] where the Fifth Circuit succinctly stated the correct rule:

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[7] INT. REV. CODE OF 1954, §162(a)(2).
[8] *Ibid.*
[9] I.T. 3395, 1940-2 Cum. Bull. 64.
[10] INT. REV. CODE OF 1939, §23(a)(1)(A), (NOW INT. REV. CODE OF 1954, §162(a)(2).
[11] INT. REV. CODE OF 1954, §162(a)(2).
[12] *See* Al J. Smith, 33 T.C. 861 (1960); Sam J. Herrin, 28 T.C. 1303 (1957); Fred M. Osteen, 14 T.C. 1261 (1950).
[13] Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 79.
[14] *Ibid.*
[15] *See* Anderson v. Commissioner, 18 T.C. 649 (1952).
[16] Rev. Rul. 61-221, 1961-2 Cum. Bull. 34.
[17] Williams v. Patterson, 286 F.2d 333 (5th Cir. 1961).

> If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and obtain sleep or rest in order to meet the exigencies of his employment or the business demands of his employment, his expenditures (including incidental expenses, such as tips) for the purpose of obtaining sleep or rest are deductible travel expenses under Section 162(a)(2) of the 1954 Code.[18]

It was pursuant to this interpretation that the Commissioner and the Court disallowed the deduction to Correll.

Focusing on the rationale behind the approval by the Supreme Court of the "Sleep or Rest" rule, can it be said that the Supreme Court drew an arbitrary line at a point where expediency may best be achieved? The Court admitted that one of the most influential factors of the Commissioner's rule was the ease and certainty of its application.[19] The Court felt, however, that an arbitrary result would follow no matter where the line was drawn[20] but pointed out that the Commissioner's rule is sound as a matter of statutory construction because it is at least arguable that the legislative use of the words "meal and lodging" conjunctively denotes an intent to allow a deduction for one only when the other is present.[21] Further, the statutory history of Section 162(a)(2) shows that the manifest statutory purpose is to allow a deduction for the added cost of meals and lodging when business activities result in a duplication of their cost.[22] With the duplication of expense as the underlying basis for the travel expense deduction, any test based upon distance is clearly invalid since the mileage traveled will not result in any duplication of expense unless the traveler stops for lodging and then duplicates the "continuing acts incurred at a permanent place of abode."[23] But even under the "Sleep or Rest" criterion, the taxpayer will receive at least a partial windfall by way of a deduction for some nonduplicated personal expenses, such as meals, which otherwise are not deductible. In spite of the previously mentioned justifications for adopting the Commissioner's rule, arguments can be formed to show a discrimination against a taxpayer who prefers his own bed, rather than a bed in another

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[18] *Id.* at 340.

[19] *Supra* note 1, at 447; *supra* note 6, at 207.

[20] *Supra* note 1, at 448, n. 14; For examples of other tests applied in this area see Jerome Mortrud, 44 T.C. 208, 214 (1965) where the court commented on the "daily routine test" which places emphasis on whether the taxpayer left the general surroundings of his tax home; Amaroso v. Commissioner, 193 F.2d 583, 585 (1st Cir. 1952) where the "distance test" was referred to, which placed the deduction on a mileage basis; cf. *supra* note 1, at 448, n. 14.

[21] *Supra* note 1, at 448.

[22] REVENUE ACT OF 1918, §214(a)(1); allowed a deduction for "ordinary and necessary business expenses." At first the Commissioner refused to allow any deduction under §214(a)(1) for meals and lodging, but later took a more liberal view allowing a deduction for the cost of meals and lodging in *excess* of ordinary expenses incurred at home. This liberal view was then stretched even further to allow the entire amount to the deduction in Revenue Act of 1921 §214(a)(1) due to difficulty involved in calculating the expense.

[23] *Supra* note 1, at 448, n. 18.

city. Discrimination might also be charged from the fact that the "sleep or rest" rule allows, even if only partially, a windfall to a qualified taxpayer.

A major influence on the Court to sustain the Commissioner's long standing interpretation was the presumption of congressional approval from the legislative reenactment of substantially the same travel deduction provision while cognizant of the Treasury's construction of that provision.[24] In order to properly appraise such a position by the Court, it is necessary to establish what authority the Treasury has to issue rulings and what effect these rulings have on the courts. Rulings and regulations prescribed by administrative agencies are generally classified as either interpretative or legislative. Legislative rulings are the product of a specific delegation of legislative authority to an administrative agency by Congress to promulgate rules in areas of uncertainty left untouched by the legislature.[25] These rulings are accorded the force and effect of law unless they are clearly in conflict with express statutory provisions, exceed the scope of delegated authority, or are unreasonable or arbitrary in their application.[26] Therefore, the reviewing court may not substitute its judgment as to the content of the ruling but is restricted to a determination of its validity[27] under the above mentioned test. Notwithstanding the Supreme Court's consistent refusal to refer to rulings or regulations as legislative,[28] the Court has recognized "the power to prescribe regulations legislative in character"[29] and furthermore, has accorded this type of regulation the force and effect of law.[30] Section 1502[31] of the 1954 Code is an example of a specific delegation of legislative power. It delegates to the secretary the authority "to prescribe such regulations as he may deem necessary in order that . . . a consolidated return" clearly reflects income and to prevent tax avoidance. Such delegation has been recognized as legislative in character.[32]

Interpretative rulings, on the other hand, may rest upon broad statutory authority or result from the particular objectives assigned to

[24] *Supra* note 1, at 449.
[25] 1 DAVIS, ADMINISTRATIVE LAW TREATISE, 312 (1958).
[26] *Id.* at 314-315; See also Union Electric Co. of Missouri, 305 F.2d 850 (Ct. Cl. 1962); Helvering v. Credit Alliance Corp., 316 U.S. 107 (1942).
[27] Santa Monica Mountain Pack Co., Ltd. v. United States, 99 F.2d 450 (9th Cir. 1958); O'Neill v. United States, 21 AFTR 2d 774 (D.C. Ohio 1968).
[28] *Supra* note 25, at 307; See also DAVIS, ADMINISTRATIVE LAW CASES-TEXT-PROBLEMS, 107-111 (2d ed. 1965) where it is shown that despite the fact that the Supreme Court does not use the term Legislative Regulation, it does give regulations legislative in nature the force and effect of law.
[29] Charles Ilfeld Co. v. Hernandez, 292 U.S. 62 (1934).
[30] American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936). *cf.* Cory Corp. v. Sauber, 363 U.S. 709 (1960).
[31] INT. REV. CODE OF 1954, §1502.
[32] Allstate Ins. Co. v. United States, 329 F.2d 346 (7th Cir. 1964); where the court held that §141 (b), the predecessor to §1502, was a grant of legislative authority, and that regulations prescribed pursuant to this section have the force and effect of law.

the administrative agency.[33] These rulings, akin to guidelines or constructions by the Commissioner, are used to clarify statutory ambiguities. The courts' inquiry into these rulings is broader than in the area of legislative rulings since in the absence of some helpful legislative history it has been held that the court may exercise its wisdom as to the content of the rulings[34] which in effect is deciding on the desirability of the interpretation. Notwithstanding this broad discretion, the courts have accorded these rulings substantial weight when (1) Congress has reenacted a code provision without a relevant amendment in the light of a known Treasures interpretation of that provision,[35] (2) where there is a long continued Treasury interpretation having acquired the "sanction of usage,"[36] or (3) where there is a contemporaneous construction by an agency of a statutory term.[37] Under section 7805 of the 1954[38] code, Congress delegated to the Treasury the authority "to prescribe all needful rules and regulations for the enforcement" of the entire code, as distinguished from the specific authorizations of legislative power found in sections like 1502.[39] Despite the lack of a specific holding by the court recognizing that the Commissioner may prescribe interpretative rulings under section 7805, it would seem that the legislature intended just that since it would be superfluous to have both the specific grants and section 7805 delegating legislative authority. Furthermore, unless section 7805 delegates interpretative authority, the Treasury is without a specific authorization to formulate interpretations of the Code.[40] Professor Davis in his Administrative Law treatise states that section 7805 regulations are not binding on the courts since statutory history has treated these regulations as other than legislative despite the appearance of a legislative delegation from the words of that section.[41] *Correl* lends support to the aforementioned proposition because there the Court relied upon the reenactment rationale to sustain a ruling issued pursuant to a section similar to section 7805[42] which construed section 23(a)(1)(A)

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[33] *Supra* note 25, at 300.

[34] *Id.* at §5.05; see also Comment, 40 COLUM. L. REV. 252, 260-261 (1940); O'Neill v. United States, 21 AFTA 2d, 774 (D.C. Ohio 1968).

[35] Cammaro v. United States, 358 U.S. 498 (1959); Helvering v. Winwell, 305 U.S. 70 (1938); *Cf.* Commissioner v. Archer, 361 U.S. 87 (1959); where there was a conflict between administrative and judicial interpretation which might have been argued against the use of reenactment in *Correll,* due to attack prior to on the "Overnight Rule' 'by some courts.

[36] 1 MERTENS, LAW OF FEDERAL INCOME TAXATION, §3.19 (1962); See also United States v. Shreveport Grain & Elevator Co., 287 W.S. 77 (1932).

[37] *Supra* note 25, at §5.06.

[38] INT. REV. CODE OF 1954, §7805.

[39] *Supra* note 31.

[40] Outside of the specific delegations of certain code provisions to prescribe rules and regulations for the purpose stated in the provision, Section 7805 is the only other delegation of authority to promulgate rules and regulations for the Code.

[41] *Supra* note 25, at 300.

[42] The ruling relied on in *Correll* was a 1940 ruling issued pursuant to §3791 of the Internal Rev. Code, which was the predecessor to Section 7805, of the 1954

of 1939 Code, a provision lacking a specific grant of legislative power.[43] If the ruling was legislative, it would have the force and effect of law without reliance upon reenactment.

The *Correll* decision gives some insight as to the force and effect to be accorded interpretative rulings but the Court failed to clearly indicate whether the rules it laid down apply to all interpretative rulings or only when the reenactment rationale applies. The Supreme Court recognized the possibility that improvements to the "sleep or rest" rule might be imagined[44] but felt that it "did not sit as a committee of revision to perfect the administration of tax laws" since the Commissioner and not the court was empowered by section 7805 "to prescribe needful rules and regulations."[45] In line with this policy, the Court laid down the following standard:

> The rule of the judiciary in cases of this sort, begins and ends with assurring that the Commissioner's regulation falls within his authority to implement the Congressional mandate in some reasonable manner.[46]

Due to the Courts' failure to define the term "congressional mandate" the aforementioned standard lends itself to several interpretations. It could be alleged that Congress expressed its mandate in section 7805, and that any reasonable ruling by the Commissioner for the enforcement of the Code is binding upon the courts except as to the question of validity. This interpretation clearly results in a reversal of weight previously accorded interpretative rulings.[47] On the other hand, it could be argued that "congressional mandate" means the legislative purpose underlying each code provision. In order to discover what Congress intended to accomplish by a specific provision it would appear that at least some evidence of legislative history or an interpretation acquiesced to by the legislature must be presented. However, in the absence of an arbitrary ruling and any such evidence of legislative intent, it could be argued that due to the Court's policy expressed in *Correll* the ruling should be sustained since it is within the province of the Commission and not the Court to interpret the Code.[48] This likewise would be a reversal of the existing rules applied to such rulings. In all fairness to the Court, it is doubtful whether the Court would have resorted to such ambiguity as is present in *Correll* if it intended to effect a radical change in the treatment of the interpretative rulings. Therefore, the Court might have been merely setting forth the standard to be applied in cases

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Code, since the ruling interpreted §23(a)(1)(A) of the 1939 Code; *supra* note 10.

[43] *Supra* note 25.
[44] *Supra* note 1, at 449.
[45] *Id.* at 450.
[46] *Ibid.*
[47] *Supra* note 33.
[48] *Supra* note 1, at 450.

of congressional acquiescence to a ruling. Such an interpretation is clearly in line with pre-existing authority;[49] furthermore, the Court relied upon congressional acquiescence through reenactment in *Correll*. Notwithstanding the improbability of a reversal of existing law, the Court does appear to at least take the first step toward giving increased weight to Treasury interpretations through its acknowledgement that in the "area of limitless factual variations it is the province of Congress and the Commissioner not the courts to make the appropriate adjustments"[50] in the Code. In line with this policy, it is conceivable that the Court feels that greater respect should be accorded to interpretative rulings; however, notwithstanding the use of words connoting a legislative type test, it is doubtful whether the Court has in mind a complete reversal of the pre-existing standard to the extent of limiting the scope of review to the validity of the ruling.[51]

One of the more enlightening statements in the *Correll* decision was the Court's reiteration of its long-continued acceptance of the reenactment rationale.[52] The theory underlying this rationale presumes that Congress is fully cognizant of all relevant Treasury rulings and regulations and tacitly approves them by reenacting the Code provision without an amendment to correct a mistaken construction.[53] This assumption of congressional omniscience of all outstanding interpretations and acquiescence by failure to amend, has been challenged as being more idealistic than realistic.[54] This attack has merit since without any legislative history acknowledging an interpretation, there is no concrete evidence of legislative approval, which is the basis of the rationale. The Supreme Court recognized this issue and avoided it in *Correll* by citing senate committee reports, which reveal a congressional awareness of the Commissioner's "Overnight Rule."[55] In so doing, the Court might be indicating that hereafter it will require some explicit evidence of congressional recognition before the reenactment rule will be sustained, thus

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[49] *Supra* note 25.

[50] *Supra* note 1, at 450; See also Commissioner v. Stidger, 386 U.S. 287, 296 (1966).

[51] *See* O'Neill v. United States, 21 AFTA 2d 774 (D.C. Ohio 1968), where the court in a case subsequent to *Correll* reiterated the pre-existing standard that Courts could exercise their wisdom concerning the content of interpretative regulations but did not mention the *Correll* decision.

[52] *Supra* note 1, at 449.

[53] *Supra* note 24, at §5.07; *cf.* Brown, *Regulation, Reenactments and Revenue Acts,* 54 HARV. L. REV. 398 (1941), which states that reenactment should be given no weight; Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955), where the Court in reference to reenactment said ". . . is on unreliable indicum at best."

[54] *See* Paul, *Use and Abuse of Tax Regulations In Statutory Construction,* 49 YALE L. J. 660 (1939-1940); Also See F. W. Woolworth Co. v. United States, 91 F.2d 973, 976 (2d Cir. 1937) where Judge Learned Hand stated, "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted . . ."

[55] *Supra* note 1, at 449, n. 20.

negotiating arguments of implied recognition not supported by concrete evidence. This seems to require at least some legislative history evidencing congressional awareness of the Treasury interpretation before the Code provision at issue was reenacted.

The *Correll* decision also indicated that the adoption of a new Code in 1954 was sufficient to qualify under the term reenactment[56] since the Court dealt with a ruling interpreting Section 23(a)(1)(A)[57] of the 1939 Code, which was substantially adopted in the 1954 Code as Section 162(a)(2).[58]

In conclusion, *Correll* has at least solved the muddle surrounding deductions for meal and lodging, by sustaining the Commissioner's "Sleep or Rest" Rule, which places the emphasis upon the necessity of rest, rather than the duration of distance of the business trip. This tranquility in the area of travel expense deduction will probably last as long as it takes a taxpayer to attempt to stretch the word "rest" to cover a "catnap" or some other species of rest. Hopefully, if the issue is presented, the Commissioner will be more explicit than using the term overnight, when in fact, he means sleep or rest, and the courts will not attempt to replace an arbitrary, but a practical rule, for one that is merely arbitrary.

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[56] Reenactment originally applied to reenactment of biennial Revenue Acts before 1939; *See* BITTKER, FEDERAL INCOME ESTATE AND GIFT TAXATION 24 (3d ed. 1964).
[57] *Supra* note 10.
[58] *Supra* note 7.