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introduction of extrinsic proof, whether by record or by testimony, to prove a detail which a witness has falsely denied. If the case can be read to permit such a practice, it would violate Wigmore's auxiliary policy.

Elam applied the *Jackson I* holding to defendant-witnesses without discussion.[44] When the defendant takes the stand, special reasons for prohibiting the details of his convictions emerge, yet the court did not examine these factors. Wigmore's policy for excluding certain evidence of a defendant's misconduct is:

> The natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take proof of it as justifying a condemnation irrespective of guilt of the present charge.[45]

Details of a defendant's prior crimes before a jury may be highly and unfairly prejudicial. In fact, because any evidence of a defendant's unsavory past may be prejudicial, the Louisiana jurisprudence has provided a defendant with a mantle of protection from impeachment by evidence of prior arrests, of crimes for which there has been no conviction, and of past criminal charges.[46] But after *Elam* and its progeny it is no longer correct to say that we "have zealously placed safeguards around the introduction of evidence of other convictions offered for the purpose of impeaching the credibility of a defendant."[47]

Gerard E. Wimberly, Jr.

THE TAXABILITY OF CASH MEAL ALLOWANCES: FORM PREVAILS OVER SUBSTANCE

During 1970 the taxpayer received a base salary of $8,739.38 and an additional $1,697.54 in cash meal allowances from the New Jersey Division of State Police. Paid biweekly in advance, the cash meal allowances were included with the taxpayer's salary and were separately stated and accounted for in the state's accounting system. No restrictions were

44. State v. Elam, 312 So. 2d 318, 325 (La. 1975).

45. 1 J.WIGMORE, *supra* note 13, § 194, at 646.

46. *See* State v. Perkins, 248 La. 298, 303 178 So. 2d 255, 259 (1965); *see also* LA. R.S.15:495 (Supp. 1952).

47. State v. Prieur, 277 So. 2d 126, 130 (La. 1973).

placed on where the taxpayer could eat as long as he remained on call within his patrol area. The United States Commissioner of Internal Revenue assessed a deficiency for the amount of the allowances not reported by the taxpayer on his 1970 federal income tax return. The United States Supreme Court granted certiorari[1] to resolve a conflict among the federal courts of appeals,[2] and *held* the cash meal allowances to be "gross income" under section 61 of the Internal Revenue Code[3] and not excludable under section 119.[4] *Commissioner of Internal Revenue v. Kowalski*, 98 S. Ct. 315 (1977).

The federal tax law has long provided a broad definition of "income."[5] Currently, Code section 61 continues this traditionally inclusive

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1. 430 U.S. 944 (1977). The United States Tax Court had held the cash meal allowances to be gross income and not excludable under section 119. 65 T.C. 44 (1975). The Third Circuit Court of Appeals reversed, following its own earlier decision in *Saunders v. Commissioner*, 215 F.2d 768 (3d Cir. 1954), and held the cash allowances excludable under section 119. 544 F.2d 686 (3d Cir. 1976).

2. *See* Wilson v. United States, 412 F.2d 694 (1st Cir. 1969) (troopers' subsistence allowance taxable); United States v. Keeton, 383 F.2d 429 (10th Cir. 1967) (*per curiam*) (troopers' subsistence allowance nontaxable); United States v. Morelan, 356 F.2d 199 (8th Cir. 1966) (nontaxable); United States v. Barrett, 321 F.2d 911 (5th Cir. 1963) (nontaxable); Magness v. Commissioner, 247 F.2d 740 (5th Cir. 1957), *cert. denied*, 355 U.S. 931 (1958) (taxable); Saunders v. Commissioner, 215 F.2d 768 (3d Cir. 1954) (nontaxable). *See also* Ghastin v. Commissioner, 60 T.C. 264 (1973) (taxable); Hyslope v. Commissioner, 21 T.C. 131 (1953) (taxable).

3. This Note will not deal with the Supreme Court's holding or analysis as regards section 61 of the Internal Revenue Code of 1954, except as the concept of exclusion of meals and lodging furnished for the convenience of the employer is necessarily implicated. See text at note 41, *infra*.

The Supreme Court relied on *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), in holding that the cash meal allowances were required to be included in "gross income" under section 61. The remaining seven-eighths of the Court's analysis concerned itself with excludability under section 119 or some other Code section. 98 S. Ct. at 319-26.

4. Section 119 of the Internal Revenue Code of 1954 provides:

> There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—
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> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.
>
> In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

5. *See* Int. Rev. Code of 1939, ch. 2, § 22(a), 53 Stat. 9, *as amended*, 53 Stat. 574 (now I.R.C. § 61); Revenue Act of 1921, ch. 136, § 213, 42 Stat. 237.

approach by defining "gross income" as "all income from whatever source derived." After certain deductions, "gross income" is the amount upon which the federal income tax is levied. Notwithstanding the expansive breadth of section 61, other parts of the Code specifically exclude items from "gross income."[6] One such item is the subject of section 119: "Meals or Lodging Furnished for the Convenience of the Employer."[7]

The phrase "convenience of the employer" has a history fraught with confusion. Even before the first American income tax statute was enacted in 1913, Lord Watson noted that a person should not be taxed on benefits received from an employer whose motive in supplying them was his own convenience and not compensation of the employee.[8] The phrase "convenience of the employer" first appeared in the early twentieth century, prior to the first codification of the federal tax laws in 1939.[9] Since that time, confusion about its exact meaning has prevailed.

When first added to the federal income tax regulations in 1920, the "convenience of the employer" doctrine extended, as a general rule, solely to benefits conferred *in kind*.[10] That same year, however, the Treasury Department extended the doctrine by applying it to *cash* payments for "supper money" furnished by an employer to a late-working employee.[11] This implied rejection of any distinction between in kind

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6. I.R.C. §§ 101-123.

7. See note 4, *supra*.

8. Tenant v. Smith, H.L. 1892 Appeal Cases 150. Lord Watson's words were:

> The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes his employers. His position does not differ from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwellinghouse or business premises instead of his own.

Id. at 158.

9. O.D. 265, 1 C.B. 71 (1919) (board and lodging furnished seamen while aboard ship exempted from income tax).

10. T.D. 2992, 2 C.B. 76 (1920). This Treasury Decision added a "convenience of the employer" section to article 33 of Regulation 45, the income tax regulations then in effect. The modified article 33 stated:

> Art. 33. *Compensation paid other than in cash* . . . . When living quarters such as camps are furnished to employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employee. But where a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person of the quarters furnished constitutes income subject to tax . . . .

When the Internal Revenue Code was recodified in 1954, substantially identical language appeared in the income tax regulations then in force. *See* Treas. Reg. 111, § 29.22(a)(3); Treas. Reg. 118, § 39.22(a)-3.

11. "Supper money" paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, *such payment not being considered*

and cash benefits was later expressly recognized in a 1925 Court of Claims case.[12] The United States Tax Court and its predecessor, the Board of Tax Appeals, did not expressly distinguish between cash and in kind benefits under the pre-1954 "convenience" doctrine.[13] Two courts of appeals cases, on the other hand, recognized the in kind/cash distinction but differed in applying it to cash subsistence allowances paid to state police troopers.[14] Thus, prior to the enactment of section 119 in the 1954 recodification, the manner of conferring the benefit was of uncertain significance.

The administrative rulings and court decisions prior to 1954 also evidenced uncertainty on how to determine whether a benefit was conferred for the convenience of the employer. The focus was sometimes upon the characterization that the employer gave to the item furnished.[15] At other times, the test applied was the necessity of the benefit to the convenient operation of the employer's business,[16] which was adopted as

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additional compensation and not being charged to the salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee. O.D. 514, 2 C.B. 90 (1920) (emphasis added).

12. Jones v. United States, 60 Ct. Cl. 552 (1925) (both in kind quarters and a cash commutation in lieu thereof not compensation to recipient army officer).

This case is often cited as authority for the distinction between civilians and members of the military, and the differing tax treatment of meals and lodging furnished to military personnel as compared to benefits furnished to civilian employees. This civilian/military distinction was involved in the instant case because the taxpayer argued that state police troopers should be allowed a meals-or-lodging exclusion just as military personnel since their respective employers and the nature of their jobs are analogous. The Supreme Court rejected this argument, reasoning that the repeal by Congress of section 120 of the Internal Revenue Code, which provided for a nontaxable statutory subsistence allowance received by police, indicated that policemen were not to be treated differently from other civilian taxpayer-employees. 98 S. Ct. 315, 326 (1977).

13. *See generally* Doran v. Commissioner, 21 T.C. 374 (1953); Hyslope v. Commissioner, 21 T.C. 131 (1953); Van Rosen v. Commissioner, 17 T.C. 834 (1951); Martin v. Commissioner, 44 B.T.A. 185 (1941); Benaglia v. Commissioner, 36 B.T.A. 838 (1937).

14. *Saunders v. Commissioner*, 215 F.2d 768 (3d Cir. 1954), rejected as determinative the fact that cash was paid rather than meals being furnished in kind. Cash subsistence allowances paid to a New Jersey state policeman were held not includable in gross income. *Magness v. Commissioner*, 247 F.2d 740 (5th Cir. 1957), applied the in kind/cash distinction to facts strongly favoring inclusion of cash subsistence payments in the gross income of a Georgia state policeman who had used the allowances to pay for meals both on and off duty.

15. *See* Doran v. Commissioner, 21 T.C. 374 (1953); O.D. 914, 4 C.B. 85 (1921); O.D. 514, 2 C.B. 90 (1920).

16. *See* Magness v. Commissioner, 247 F.2d 740 (5th Cir. 1957); Jones v. United States, 60 Ct. Cl. 552 (1925); Hyslope v. Commissioner, 21 T.C. 131 (1953); Van Rosen v. Commissioner, 17 T.C. 834 (1951); Chandler v. Commissioner, 41 B.T.A. 165 (1940); Benaglia

authoritative by the Treasury Department in 1940.[17] The courts, not required to follow Treasury Regulations, continued to differ in their analytical approach to meals and lodging furnished by the employer.[18]

Although the majority of the courts favored the "business necessity" rationale, originally endorsed by the Treasury Department, the Department nevertheless expressly modified, in 1950, all prior administrative rulings and decisions concerning this approach.[19] The aim of this modification was to shift emphasis to whether benefits furnished by an employer were "compensation." It created additional complexity by leaving untouched the "employer characterization" approach of an earlier administrative decision.[20] The courts also complicated the application of the "convenience of the employer" doctrine. Tax Court cases[21] tended to follow the new Treasury Department rationale while cases decided by other federal courts conflicted in the significance that each attributed to the compensatory character of the benefits.[22] This chaos formed the backdrop in 1954 for the enactment of section 119, "a provision designed to end the confusion as to the tax status of meals and lodging furnished an employee by his employer."[23]

The 1954 Code imposed two requirements in section 119 for excluding from gross income the meals furnished by an employer to his em-

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v. Commissioner, 36 B.T.A. 838 (1937); Mimeograph 5023, 1940-1 C.B. 14; O.D. 915, 4 C.B. 85 (1921); O.D. 814, 4 C.B. 84 (1921).

17. "As a general rule, the test of 'convenience of the employer' is satisfied if living quarters or meals are furnished to an employee who is required to accept such quarters and meals in order to perform properly his duties." Mimeograph 5023, 1940-1 C.B. 14, 15.

18. *See* the post-1940 cases cited in notes 15 and 16, *supra.*

19. The Treasury Department's modified view in 1950 was that:

> The "convenience of the employer" rule is simply an administrative test to be applied only in cases in which the compensatory character of . . . benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered.

Mimeograph 6472, 1950-1 C.B. 15 (stating that the position adopted was in accord with *Martin v. Commissioner*, 44 B.T.A. 185 (1941) and I.T. 2692, XII-1 C.B. 28 (1933)).

20. O.D. 514, 2 C.B. 90 (1920); see note 11, *supra.*

21. *See* Romer v. Commissioner, 28 T.C. 1228 (1957); Dietz v. Commissioner, 25 T.C. 1255 (1956); Brasher v. Commissioner, 22 T.C. 637 (1954); Doran v. Commissioner, 21 T.C. 374 (1953); Hyslope v. Commissioner, 21 T.C. 131 (1953); Van Rosen v. Commissioner, 17 T.C. 834 (1951).

22. *Compare* Magness v. Commissioner, 247 F.2d 740 (5th Cir. 1957) *and* Diamond v. Sturr, 221 F.2d 264 (2d Cir. 1955) *with* Saunders v. Commissioner, 215 F.2d 768 (3d Cir. 1954) *and* Diamond v. Sturr, 116 F. Supp. 28 (N.D.N.Y. 1953), *rev'd*, 221 F.2d 264 (2d Cir. 1955).

23. H.R. REP. No. 1337, 83d Cong., 2d Sess. 18 (1954). Substantially similar language appears in S. REP. No. 1622, 83d Cong. 2d Sess. 19 (1954).

ployee: the meals must be furnished on the business premises of the employer and must be furnished for his convenience. A third requirement was added for excluding lodging—the employee must have accepted the lodging as a condition of his employment.[24]

The legislative history of section 119 yields valuable, but again confusing, interpretative guidance.[25] The approach of the House Ways and Means Committee would have completely done away with the "convenience of the employer" doctrine by deleting that term of art from section 119 altogether.[26] The Senate Finance Committee's view, which ultimately prevailed, was that the "basic test of exclusion is to be whether the meals or lodging are furnished primarily for the convenience of the employer (and thus excludable) or whether they were primarily for the convenience of the employee (and therefore taxable)."[27] Moreover, the detailed discussions of the technical provisions in the bills contained the limitation made by both committees, but not included in the general explanations, that section 119 was to apply "only to meals or lodging furnished in kind."[28]

The language of section 119 has not changed since the 1954 Code was enacted. Official income tax regulations[29] generally construe the provision in the fashion that the legislative committee reports suggest, except for changes in emphasis and refinement. Jurisprudence applying

24. "The phrase 'required as a condition of his employment' means required in order [for the employeee] to properly perform the duties of his employment." S. REP. No. 1622, 83d Cong., 2d Sess. 190 (1954).

25. Sources for the legislative history of section 119 of the Internal Revenue Code of 1954 are the reports of the Senate Finance Committee and the House Ways and Means Committee to the tax revision bill, H.R. 8300, 83d Cong., 2d Sess. (1954). Two separate sets of comments are contained in these reports: the "General Explanation" and the "Detailed Discussion of Technical Provisions of the Bill," the latter referred to by the Supreme Court in the instant case as technical appendices to the reports. Differences among the two "General Explanations" and the two "Detailed Discussions" create confusing conflicts which this Note addresses. For "General Explanations," see H.R. REP. No. 1337, 83d Cong., 2d Sess. 18 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 19 (1954). For technical appendices, see H.R. REP. No. 1337, 83d Cong., 2d Sess A38 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 190 (1954).

26. The House's version of the tax revision legislation provided, as explained in the committee report, that meals and lodging furnished an employee by his employer "are to be excluded from the employee's income if they are furnished at the place of employment and the employee is required to accept them at the place of employment as a condition of his employment." H.R. REP. No. 1337, 83d Cong., 2d Sess 18 (1954).

27. S. REP. No. 1622, 83d Cong., 2d Sess. 19 (1954).

28. H.R. REP. No. 1337, 83d Cong., 2d Sess. A39 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 190 (1954).

29. *See, e.g.*, Treas. Reg. § 1.119-1 (1977).

section 119 to cash meal allowances paid to state policemen by their employers has been marked by conflicting results and varied reasoning. The First Circuit and United States Tax Court have generally honored the in kind/cash distinction and have held cash subsistence allowances to be taxable income.[30] The Fifth, Eighth, and Tenth Circuits have not considered the form of the benefit determinative and have held such allowances nontaxable.[31]

In the instant case, certiorari was granted by the United States Supreme Court to resolve these conflicts.[32] The Court analyzed congressional intent in enacting section 119 and drew two principal conclusions. First, section 119 was not intended to extend to cash payments of any kind.[33] Secondly, the "convenience of the employer" doctrine, a jurisprudential device originally used to determine what should be included in section 61 "gross income," would not extend to cash meal allowances, even if noncompensatory in nature.[34] Both conclusions were deduced from language in the technical appendices to the House and Senate committee reports on their respective versions of the new section 119. The Senate Finance Committee, in language substantially similar to that used by the House Ways and Means Committee, stated in the technical appendix to its bill: "Section 119 applies only to meals or lodging furnished *in kind.* Therefore, any *cash* allowances continue to be includible in gross income *to the extent that such allowances constitute compensation.*"[35] The net effect of the conclusions drawn by the Court from the quoted language is to deny excludability absolutely to cash allowances for food and lodging solely because cash, rather than in kind,

30. Wilson v. United States, 412 F. 2d 694 (1st Cir. 1969); Ghastin v. Commissioner, 60 T.C. 264 (1973). The Fifth Circuit, in *Magness v. Commissioner*, 247 F.2d 740 (5th Cir. 1957), recognized that the in kind/cash distinction was worthy of careful consideration and impliedly utilized it to hold cash subsistence allowances taxable to a Georgia state policemen. Because *Magness* was decided under the 1939 Code it is not grouped with or compared to cases arising under section 119 of the 1954 Code.

31. United States v. Keeton, 383 F. 2d 429 (10th Cir. 1967) (per curiam); United States v. Morelan, 356 F. 2d 199 (8th Cir. 1966); United States v. Barrett, 321 F. 2d 911 (5th Cir. 1963). *Saunders v. Commissioner*, 215 F.2d 768 (3d Cir. 1954), a case decided under the 1939 Code, expressly repudiated the in kind/cash distinction in holding a New Jersey state policeman's meal allowances nontaxable.

32. 430 U.S. 944 (1977), *granting cert. in* Commissioner v. Kowalski, 544 F.2d 686 (3d Cir. 1976), *reasons for reviewing*, 98 S. Ct. 315, 318 (1977).

33. 98 S. Ct. at 319.

34. *Id.* at 325.

35. S. REP. No. 1622, 83d Cong., 2d Sess. 190-91 (1954) (emphasis added); *see* H.R. REP. No. 1337, 83d Cong., 2d Sess. A39 (1954).

benefits were furnished.[36]

The situation of the state police trooper is a perfect example of the inequities inherent in the Court's holding in the instant case. Many states, like New Jersey in the instant case, will realize that in kind meal stations for patrolling state police troopers not only are expensive to provide and inefficient in comparison to a cash meal allowance system, but also require the troopers to leave their patrol area during the meal period. Use of privately owned restaurants, on the other hand, allows the state to avoid involvement in the food service business, leaves the trooper both within his patrol area and in the public view (a deterrent to crime), and promotes good will and sound relationships between the public and law enforcement agencies. Thus, drawing so absolute a distinction between in kind and cash benefits removes needed flexibility from the tax law, ignores social and economic policy, and elevates form over substance.[37]

A preferable approach would have been for the Court to follow the language of the congressional committee reports strictly, deny section 119 excludability to all cash payments, but acknowledge a non-statutory exclusion for certain noncompensatory cash allowances. This option recognizes that the judiciary should interpret, not amend, legislative enact-

36. The first conclusion of the Court (that section 119 does not cover cash payments of any kind) is solidly supported by the first sentence of the quoted appendix to the House committee report. Support for the Court's second conclusion (that noncompensatory cash meal allowances are not excludable under an uncodified "convenience of the employer" doctrine) is not so apparent, or so solid. The reasoning advanced by the Supreme Court in arriving at the second conclusion was: section 119 replaced prior law; there was no reason to suppose that Congress intended to recognize a class of excludable cash meal payments; the second sentence of the excerpt quoted in the text was probably a reference to otherwise deductible meal payments (*i.e.*, I.R.C. § 162(a)(2), *as amended by* 26 U.S.C. § 162(a)(2) (Supp. 1977), ordinary and necessary business traveling expenses); and to conclude otherwise would create a wider exclusion for cash than for meals in kind. The first reason assumes that which is at issue; the second and third are refuted by the congressional committee reports when read in their entirety; and the fourth reason elevates form over substance, as well as expressing a fear unfounded in fact. See text at notes 38-43, *infra.*

As regards section 162(a)(2), the Supreme Court has held that its language "while away from home" requires a taxpayer to "sleep or rest" if he is to receive the deduction provided. United States v. Correll, 389 U.S. 299 (1967).

37. *See generally* United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); United States v. Barrett, 321 F.2d 911 (5th Cir. 1963); Saunders v. Commissioner, 215 F.2d 768 (3d Cir. 1954); Kowalski v. Commissioner, 65 T.C. 44, 65-68 (1975) (dissenting opinion), *rev'd,* 544 F.2d 686 (3d Cir. 1976), *rev'd,* 98 S. Ct. 315 (1977); J. CHOMMIE, FEDERAL INCOME TAXATION 52-57 (2d ed. 1973); [1977, 1978] 1 STAND. FED. TAX REP. (CCH) ¶¶ 1187-1191.09; Jordan, *Can Cash Payments to Employees Be Excluded as Meals Under Section 119?,* 45 J. TAX. 310 (1976).

ment; respects social and economic policy; and adds the flexibility required by the myriad of factual possibilities in meals-and-lodging cases.

The Supreme Court's opinion does not reveal the full extent to which Congress contemplated a class of noncompensatory cash allowances when it enacted section 119. Read in their entirety, the House and Senate committee reports disclose a workable scheme for meals and lodging furnished by an employer to his employee, whether in kind or through use of a cash allowance.[38] Section 119 extends to meals and lodging furnished *in kind* by the employer to his employee, on the business premises, primarily for the employer's convenience, and in the case of lodging, as a condition to employment. Although section 119 excludability is unavailable for cash allowances, the taxpayer should not be required to include them in "gross income" under section 61 if they are: noncompensatory in nature; furnished primarily for the convenience of the employer; bestowed due to business necessities; and in the case of lodging, a condition of employment.[39] As the analysis employed by the

38. S. REP. No. 1622, 83d Cong., 2d Sess. 19, 190-91 (1954); H.R. REP. No. 1337, 83d Cong., 2d Sess. 18, A38-A39 (1954). The technical appendix to the House report clearly states that if the two requirements for excludability under section 119 are not met, "the value of any meals or lodging furnished the employee must be included in his gross income to the extent that they constitute compensation." *Id.* at A39. The appendix continues, noting that section 119 applies only to in kind meals and lodging, and "[t]herefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, *as under existing law, to the extent that such allowances represent compensation.*" *Id.* (emphasis added).

The technical appendix to the Senate report states that section 119 applies "whether or not such meals or lodging are furnished as compensation." S. REP. No. 1622, 83d Cong., 2d Sess. 190 (1954). This appendix also alludes to a class of noncompensatory cash allowances other than by the terms of section 119. *Id.* at 190; see text at note 39, *infra*. *See* Kowalski v. Commissioner, 65 T.C. 44, 65-68 (1975) (dissenting opinion), *rev'd*, 544 F.2d 686 (3d Cir. 1976), *rev'd* 98 S. Ct. 315 (1977).

Both congressional reports thus evidence an intention to allow cash allowances for meals and lodging to be excluded from gross income when they do not represent compensation to the employee. The contention that the reports were referring to a *deduction* for section 162(a)(2) business traveling expenses is refuted by the broadness of the language in the reports and the fact that inclusion (or exclusion) in gross income was being discussed by the Senate committee, not deductibility (or non-deductibility) from gross income.

39. Although the only apparent requirement for the exclusion of cash allowances was that they were not compensation, the congressional committee reports, when combined with the subsequent jurisprudence applying section 119, suggest the wisdom of narrowing the circumstances in which excludability is granted in all meals-and-lodging cases. Accordingly, the last three requirements enumerated in the text are really designed to determine if the first requirement (noncompensatory character) has been satisfied, and at the same time, to provide guidelines for narrowing the nonstatutory exclusion for meals and lodging.

Eighth Circuit in *United States v. Morelan*[40] illustrates, the answer to the "convenience" issue should depend on all of the circumstances involved, with special attention given to the extent to which the employee is restricted in spending the cash allowance. Resolution of the "compensation" issue, as *Morelan* indicates, would be aided by determining whether there is a definite correlation between the amounts expended for otherwise qualifying benefits and the amount of the allowance.

The outlined scheme honors the boundaries of section 119 as Congress intended them and does not violate the rule that exclusions are to be construed narrowly.[41] Rather, the exclusion advocated arises under the judicial authority to interpret the extent of "gross income" under section 61. As the Court in the instant case implied,[42] if a taxpayer demonstrates that the meal allowances he received were necessary for him "properly to perform his duties," then the creation of a wider exclusion for cash than in kind benefits could be prevented. Furthermore, application of an approach such as *Morelan* employed would greatly diminish the possibility that cash allowances would be excluded from gross income when they are really disguised compensation.[43]

The impact of the instant case is uncertain due to the issues left untouched by the Court. The "business premises" issue, long a matter of discussion in meals-and-lodging cases involving state police troopers,[44] was avoided by the Court's reliance on the in kind/cash distinction. Whether a state's "business premises" extend further than the locations it owns in a proprietary capacity is of great importance, especially when the large number of taxpayers employed by state governments is considered. Further uncertainty will result from the Court's express refusal to consider the excludability of "supper money" and sporadic meal reimbursements.[45] The separation of these types of payments from section 119 meals and lodging, and the possibility that they may be excludable from "gross income," suggests that specific exclusions will continue to arise under the definition found in section 61.

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40. 356 F.2d 199 (8th Cir. 1966).

41. *See* Commissioner v. Anderson, 371 F.2d 59, 67 (6th Cir. 1966), *cert. denied*, 387 U.S. 906 (1967).

42. 98 S. Ct. at 325.

43. *See* United States v. Morelan, 356 F.2d 199, 204 (8th Cir. 1966).

44. *See generally* cases cited in note 2, *supra*; Dole v. Commissioner, 43 T.C. 697 (1965), *aff'd*, 371 F.2d 59 (6th Cir. 1966), *cert. denied*, 387 U.S. 906 (1967).

45. 98 S. Ct. at 324 n.28. Whether employers are required to withhold federal income taxes for income received by employees in the form of cash meal allowances was answered in the negative by the Supreme Court in Central Illinois Public Service Co. v. United States, [1977-78 U.S. Tax Cas.] STAND. FED. TAX REP. (CCH) § 9254.

The Supreme Court's refusal to allow Trooper Kowalski to exclude his cash meal allowances from gross income was supported by the facts of the instant case,[46] which indicated that the allowances were compensation. Had the Court confined its holding to the factual boundaries of the instant case, the excessively broad in kind/cash distinction would not have been necessary. The Court's analysis, and the ultimate impact of its holding, will serve only to engender further public dissatisfaction with the federal internal revenue system. The basic purpose of the Internal Revenue Code of 1954 is aptly expressed in words still germane today: "to remove inequities, to end harassment of the taxpayer, and to reduce tax barriers to future expansion of production and employment."[47] Charges of an impersonal judiciary applying a complex morass of tax law without regard for the practical inequities that may result are justified when, as in the instant case, this basic purpose is ignored.

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46. Facts favoring exclusion were: the New Jersey cash allowance plan replaced its in kind system for reasons of efficiency and expense; the meal allowance was paid in advance; although paid in one check, the allowance was stated separately from the salary; the allowances were separately accounted for in the state's accounting system and funds for salaries and allowances were never commingled.

Facts indicating that exclusion should be denied were: the allowances were not required to be spent on the trooper's mid-day meals; no accounting of the manner in which the allowances were spent was required; no reduction in the allowance was made when a trooper was assigned elsewhere than patrol; police brochures described the allowance as if it were an element of salary; the amount of the allowance was subject to negotiations between the state and the troopers' union, was included in gross pay for computing pension benefits, and varied according to the recipient's rank; the allowances received by Trooper Kowalski were equal to one-fourth of his base salary (excluding the allowances); the United States Tax Court had held the allowances not excludable.

47. S. REP. No. 1622, 83d Cong., 2d Sess. 1 (1954); H.R. REP. No. 1337, 83d Cong., 2d Sess. 1 (1954).