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# STATE POLICE CASH SUBSISTENCE ALLOWANCES AND SECTION 119 OF THE INTERNAL REVENUE CODE

*Koerner v. United States\**

## INTRODUCTION

The well-known objective of the federal income tax is to tax all income regardless of the source of that income.<sup>1</sup> The collection power assigned to Congress is expressed through the Internal Revenue Code.<sup>2</sup> In the exclusion section of the Code Congress indicated that some types of income should escape taxation and, consequently, listed sources of income that are specifically excluded from computations of federal tax liability.<sup>3</sup> The impact of the Code is that unless an item is specifically excluded, it is to be included in gross income.<sup>4</sup>

One item of excluded income in §119 of the Internal Revenue Code of 1954 is "meals furnished for the convenience of the employer."<sup>5</sup> A further refinement of this exclusion was considered in the recent case of *Koerner v. United States*.<sup>6</sup> In *Koerner* the Fourth

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\*550 F.2d 1362 (4th Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3754 (U.S. May 5, 1977) (No. 76-1539).

1. U. S. CONST., Amend. XVI. The amendment reads as follows:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

2. Title 26 of the United States Code pertains to the Internal Revenue Code.

3. INT. REV. CODE OF 1954, §§101-124.

4. INT. REV. CODE OF 1954, §61.

5. INT. REV. CODE OF 1954, §119 provides:

There shall be excluded from gross income of an employee the value of any meals . . . furnished to him by his employer for the convenience of the employer, but only if—

- (1) in the case of meals, the meals are furnished on the business premises of the employer . . . .

. . . .

In determining whether meals . . . 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 . . . are intended as compensation.

6. 550 F.2d 1362 (4th Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3754 (U.S. May 5, 1977) (No. 76-1539).

Circuit Court of Appeals determined that cash subsistence allowances for the cost of meals of an on-duty state policeman are beyond the meaning of the statute and are therefore a proper inclusion in income. Interpretation of §119 lies at the center of the controversy surrounding exclusion of such cash subsistence allowances. A liberal interpretation of this statute utilizing the doctrine of convenience to the employer justifies the exclusion. However, a strict interpretation based on the entire statute would include such payments in gross income.

In light of these divergent interpretations, §119, as it relates to meals furnished for the convenience of the employer in the form of cash subsistence allowances, will be discussed by examining the conflicting interpretations of Congress, the Internal Revenue Service, and the courts, culminating with the problems to be encountered as the Supreme Court of the United States reviews the application of the statute in the October 1977 term.<sup>7</sup> A review of the facts in *Koerner* will set the stage for discussing §119 and cash subsistence allowances.

#### FACTS OF THE CASE

*Koener v. United States* was a refund action in the United States District Court of West Virginia,<sup>8</sup> brought by a West Virginia state policeman against the United States for refund of income taxes and assessed interest for the years 1967, 1968, and 1969.<sup>9</sup> Trooper Koerner claimed that the history of the cash subsistence system of the police department clearly indicated that the payments were for

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7. Other cases on the issue of cash subsistence payments that are awaiting U.S. Supreme Court review are *Kowalski v. CIR*, 544 F.2d 686 (3rd Cir. 1976), *cert. granted*, 45 U.S.L.W. 3651 (U.S. Mar. 28, 1977) (No. 75-1095) (cash payments exclusion allowed for New Jersey state trooper); and *U.S. v. Smith*, 543 F.2d 1155 (5th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3643 (U.S. Mar. 7, 1977) (No. 75-1243) (cash payments exclusion allowed for Mississippi Highway patrolman).

8. There were three courts open to a taxpayer to litigate a tax dispute: the U.S. Tax Ct., the U.S. Dist. Ct., and the U.S. Ct. of Claims. However, the U.S. Dist. Ct. has jurisdiction over cases only arising in a tax deficiency which barred Koerner from filing for a refund. The U.S. Court of Claims had jurisdiction, but the only appeal from an adverse decision was to the U.S. Supreme Court on a writ of certiorari. Writs of certiorari from the U.S. Court of Claims are granted at the rate of about one per year. Therefore, the U.S. District Court was the better forum for Koerner. M. GARBIS AND A. SCHWARTZ, *TAX REFUND LITIGATION* 14-19 (ALI-ABA Taxation/Practice Handbook 1971).

9. The complaint was filed by Morgan P. Koerner and Juanita B. Koerner, however, Juanita B. Koerner was a party only by virtue of the joint return provision of INT. REV. CODE OF 1954, §6013 for the years in question.

the convenience of his employer and, therefore, should be excluded from his gross income under §119.<sup>10</sup> Trooper Koerner showed that he had received cash subsistence payments for meals eaten on duty at a restaurant of his choice. However, he remained under the control of the police department since he was required to report the time and the location to his superior.<sup>11</sup> Reporting to his superior allowed the department to contact him in the event of an emergency. Being on emergency call while eating supported Trooper Koerner's contention that the meals were for the convenience of his employer and not for his own convenience. Also, the fact that Trooper Koerner received checks separate from payroll covering the actual number of days on duty<sup>12</sup> was evidence that the payments were not additional compensation for work performed, but an allowance in lieu of receiving food in kind from the department. Since the cash relieved the department from preparing meals, but permitted them to maintain control of the troopers, and since the cash was not for additional services rendered, Trooper Koerner made his claim for exclusion from the position that the payments were for the convenience of his employer.

The district court agreed with Officer Koerner and held that the cash subsistence allowances were excludable.<sup>13</sup> Although the government contended that the meals failed to meet the "in kind" requirement of the statute, the court answered that on the basis of *United States v. Barrett*<sup>14</sup> the meals did not have to be "in kind."<sup>15</sup> The government further argues that the "on the employer's

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10. During the initial years of operation of the West Virginia Department of Public Safety (State Police Department) the troopers lived and ate at barracks provided by the state so that troopers on 24-hour call would be available at all times. As the Department expanded, the administrative burden of the arrangement increased to a point where the state economies required that cash payments be given to troopers in lieu of providing quarters and meals. In effect, it was cheaper for the state to make payments than provide in kind. Paying the subsistence not only relieved the Department of the burden of providing eating facilities, but also gave the state the additional benefit of having constant patrols on the highways which eliminated the problem of unpatrolled areas while troopers went back to the barracks to eat. 404 F. Supp. 1128, 1129-30 (S.D.W. Va. 1975).

11. Koerner received subsistence at the rate of \$5.50 per day for 1967 and \$5.75 per day for 1968-1969. *Koerner v. U.S.*, 404 F. Supp. at 1130.

12. These payments were not considered compensation by the state of West Virginia. *Id.* at 1130. However, the intent of the state was not determinative of an exclusion according to INT. REV. CODE OF 1954, §119. *See* note 5 *supra*.

13. *Id.* at 1132.

14. *Id.* at 1131.

15. 321 F.2d 911 (5th Cir. 1963) (Cash allowances held excludable for Miss. Highway Patrol). To include cash allowances within the definition of meals, the *Barrett* court relied on a pre-1954 Code decision which said:

premises" requirement was not satisfied. The district court responded by citing *Morelan v. United States*<sup>16</sup> and *Barrett*. Based on this authority, the court held that in such situations the Commissioner's interpretation of business premises was too narrow and unrealistic since the "business premises" includes the entire state.<sup>17</sup> Finally, the district court relied on the doctrine of convenience of the employer as the key determinant of an exclusion of cash subsistence allowances under §119.<sup>18</sup> Following this test the district court held "that the record . . . conclusively shows that the meals for which a cash subsistence is paid were furnished on the business premises of the employer at the convenience of the employer."<sup>19</sup>

On appeal the Fourth Circuit Court of Appeals reversed the district court's determination that the cash subsistence allowances were excludable from gross income.<sup>20</sup> Rather than analyzing the facts to determine the meaning of §119, the court used the approach of interpreting the statute and then applying the facts to that interpretation. The outcome of this analysis was the denial of the §119 exclusion.

The court of appeals formed the foundation for reversal on the premise that no deductions are allowed unless authorized by statute.<sup>21</sup> Building on this premise the court determined that the

The rationale of the rule should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof . . . . Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation.

*Saunders v. Comm'r*, 215 F.2d 768, 771 (3rd Cir. 1954) (Decided in 1954, but under the 1939 Int. Rev. Code).

16. 237 F. Supp. 879, 884 (D. Minn. 1965), *aff'd* 356 F.2d 199 (8th Cir. 1966).

17. 404 F. Supp. at 1131. The *Morelan* court said the government's argument that the meals were not on the business premises is good in theory, however, realistically the business premises of the state extend over the entire state and particularly to the highways where the policemen worked. 237 F. Supp. at 884. *Barrett* added: "In view of the special nature and functions of the highway trooper's work, it is unrealistic to treat the employer's place of business as limited to the state patrol headquarters." 321 F.2d at 912.

18. *Id.* at 1132.

19. *Id.*

20. *Koerner v. U.S.*, 550 F.2d 1362, 1363-64 (4th Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3754 (U.S. May 5, 1977) (No. 76-1539).

21. *Id.* at 1363. See *CIR v. Jacobson*, 336 U.S. 28, 49 (1949); *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 49 (1940).

guideline for interpretation was to strictly construe the authorized deductions.<sup>22</sup> Utilizing these rules for statutory construction, the first part of §119 construed was "furnished on the business premises of the employer." Emphasizing the strict construction approach, the court in one swift sentence stated, "The plaintiffs while engaged in their duties concededly are not furnished meals 'on the business premises of the employer.'" In view of the fact that the initial term of the statute was breached, the appellate court found that the subsistence payments "clearly" did not satisfy the requirements of §119.<sup>23</sup> Finding the district court approach inadequate since it followed the traditional approach of using the particular facts to define the statute, the Fourth Circuit overturned the district court's decision by applying the strict interpretation of the statute to the facts presented.

#### SECTION 119, MEALS FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER

The Internal Revenue Code of 1954, §119 provides:

There shall be excluded from gross income of an employee the value of any meals . . . furnished to him by his employer for the convenience of the employer, but only if—

- (1) in the case of meals, the meals are furnished on the business premises of the employer . . .<sup>24</sup>

The key phrases of the statute on which there have been conflicting interpretations are "meals," "convenience of the employer," and "furnished on the business premises of the employer." Each of the

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22. *Id.* The court freely interchanged the terms "exclusion" and "deduction," however, if strictly defined, an "exclusion" relates to specific items not included in computing gross income. A "deduction" is that which is subtracted from gross income to arrive at taxable income. E. GRISWOLD AND M. GRAETY, *FEDERAL INCOME TAXATION* 84 (1976). Therefore, if the court in discussing "meals" were to call the cash subsistence allowances "exclusions," the applicable section is 119, but if the court uses the term deduction, the controlling section is 162 as trade or business expenses, or 262, personal living and family expenses.

23. The court must state that the subsistence payments are "clearly" not excludable to meet the requirements of *CIR v. Duberstein*, 363 U.S. 278 (1960), as follows: [T]he judge's finding must stand unless "clearly erroneous." A finding is "clearly erroneous" where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

*Id.* at 291.

24. INT. REV. CODE OF 1954, §119.

three branches of the federal government has interpreted these terms. Congress expressed its intent through the congressional reports which accompany the statutes when passed by the legislature.<sup>25</sup> On the basis of these reports, the Internal Revenue Service defined the statutes by publishing regulations, writing rulings, and allowing or denying exclusions claimed under the statute. The courts' application of the statute has resulted in a series of conflicting decisions. An examination of the reasoning of each branch demonstrates the diverse approaches to §119.

### *Congressional Intent*

A study of the House of Representatives Report and the Senate Report indicates the congressional intent at the time of enacting the statute.<sup>26</sup> From these reports the intention of Congress appears to be that the section applies only to meals in kind,<sup>27</sup> that cash allowances are includable in gross income to the extent they are compensation,<sup>28</sup> that the test of exclusion is whether the meals are primarily employer convenience or employee convenience,<sup>29</sup> and that meals are excluded only if furnished on the business premises of the employer.<sup>30</sup> The major test of balancing the convenience of employer or employee seems to be applicable only after the income is determined to be in the form of meals *and* on the business premises. The report expresses the test as being more than the employer conve-

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25. The Ways and Means Committee of the House of Representatives initially works out the details of a revenue bill. Then the passed bill is sent to the Senate accompanied by a committee report justifying the action taken. The Finance Committee of the Senate revises a bill to fit its desires and also prepares a report. If there are differences between the two committees, a Joint Conference Committee resolves any differences and drafts the final bill which, if passed and signed, becomes the law. The committee reports of the House, Senate, and Conference Committees are important since they contain the congressional intent and help to explain the technical aspects of the law. Both the Internal Revenue Service and the courts rely on the committee reports to interpret the law. J. CHOMMIE, *FEDERAL INCOME TAXATION* 10 (2d ed. 1973). For §119 the House Report is reported at 3 U.S. CODE CONG. & AD. NEWS 4175-76 (1954). However, the more significant report for this section is the Senate Report. *Id.* at 4648, 4825-26. The differences between the two reports were resolved in favor of the Senate version of the bill. *Id.* at 5286 (Conference Comm. Report).

26. *Id.*

27. *Id.* at 4825. See generally Fisher, *Tax Free Income: Compensation in Kind and Quasi-in-Kind*, 5 WM. & MARY L. REV. 46 (1964).

28. *Id.*

29. *Id.* at 4648.

30. *Id.* at 5286. The committee report uses the same language as the statute implying that there is no other more specific phrase to convey the meaning "on the business premises."

nience doctrine alone, but including the application of the doctrine in specific meal contexts.<sup>31</sup>

### *Internal Revenue Service*

Another source of interpretation of §119 can be found in the income tax regulations promulgated by the Internal Revenue Service (hereinafter IRS).<sup>32</sup> Although the regulations dealing with §119 parallel many of the requirements for exclusion in the congressional report, they omit the balancing test of convenience to employer or employee. Essentially, the IRS looks only at the convenience of the employer after establishing that the meals are "in kind" and "on the business premises."<sup>33</sup> Further, the regulations go beyond the congressional report to define the term "business premises of the employer" as the place of employment of the employee.<sup>34</sup> The IRS position follows the congressional intent that cash allowances are includable to the extent they are compensation.<sup>35</sup>

In addition to the regulations, the Internal Revenue Service presents its policies concerning administering the tax laws through

31. An examination of other Int. Rev. Code sections implies that when Congress intended an exclusion of both amounts received for services and the value of services received, it stated that intent by specifically stating such in the statute. *See, e.g.*, §107 (A clergyman is not taxed on either a residence furnished to him or any cash allowance which he uses for rent or to provide a home); § 117 (Scholarship and fellowship grant recipients are not taxed on fees, services, or allowances for expenses received); §120 (1976) (Employees may exclude the value of personal legal services or amounts received as reimbursements for such services if under a qualified plan).

32. Treas. Reg. § 1.119-1 (1964) provides in part:

(a) *Meals.* (1) The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer.

33. Treas. Reg. §1.119-1 (1964) provides in part:

(c) *Rules.* (1) For purposes of this section, the term business premises of the employer generally means the place of employment of the employee. . . . (2) The exclusion provided by section 119 applies only to meals . . . furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals . . . in kind, the value of such meals . . . is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals . . . received by an employee are includible in gross income to the extent that such allowances constitute compensation.

34. *Id.*

35. *Id.*



the use of periodic publications.<sup>36</sup> Regarding §119 the IRS issued a Technical Information Release (TIR)<sup>37</sup> which states that the IRS refuses to follow past court decisions which allowed cash allowances as exclusions.<sup>38</sup> Foremost among the reasons for contradicting these decisions are the self-promulgated regulations relating to §119,<sup>39</sup> that police should receive the same tax treatment for allowances as other taxpayers, and the repeal of §120 which, seemingly, is a congressional response ending favorable legislation for police officials.

In interpreting §119 the IRS promulgated regulations as guided by congressional intent. Consequently, when circuit court opinions clashed with the regulations, the IRS denounced those contrary decisions. With this stalemate between the IRS and the courts the effect appears to be that the taxpayer should follow the regulation unless he would rather go to court to possibly obtain an exclusion.

### *Judicial Interpretation*

Upon choosing to take his case to court, a taxpayer will receive various constructions depending on the circuit court in which he

36. See generally L. REDMAN AND J. QUIGGLE, PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE 39-65 (5th ed. 1974).

37. TIR's are used by the IRS to speed the dissemination of information to the public without the formalities of other sources. The TIR's often include announcements of proposed changes in regulations, the position of the IRS on a district or circuit court decision, advance notice of Revenue Rulings, announcements of hearings of proposed rulemaking, or the requirements of newly enacted legislation. *Id.* at 50-51.

38. TIR No. 741 (Jun. 21, 1965), [1961-65 Rulings] MERTEN'S LAW OF FED. INC. TAXATION 378 (M.A. 625). The IRS will not follow the decisions of *Barrett* and *Saunders*.

39. See note 33 *supra* and accompanying text.

40. Special treatment was given state policemen under §120:

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

However, this section was repealed by the TECHNICAL AMENDMENT ACT OF 1958, 72 STAT. 1607 (1958), when Congress felt that states were changing their systems of compensation to allow their state policemen to take advantage of the exclusion. [Code Commentary] MERTEN'S LAW OF FED. INC. TAXATION §120. This was construed by the IRS as congressional intent that state policemen should not be given a special interpretation of §119 for cash subsistence allowances. The 1976 amendments to the 1954 Code reinstated §120, however, this new section which regards an exclusion of amounts received under qualified group legal services plans should not be confused with the 1954 Code §120. See generally Comment, *Taxation-Statutory Subsistence Allowances Paid to Highway Patrolmen Are Excludable From Gross Income, Notwithstanding the Repeal of Section 120 of the Internal Revenue Code*, 18 SYRACUSE L. REV. 138 (1966).

files suit. By a plain reading of the statute, it would appear logically inconsistent to hold that cash payments should be considered "meals." The employer gives the employee money to eat where he wants, usually prohibiting him from eating on the premises. In actuality, the employer gives the employee the money as an inducement *not* to eat on the premises. Nevertheless, four circuits recognize cash allowances as excludable under §119.<sup>41</sup>

Adopting a part of the expressed congressional intent, these courts use the balancing test (benefit to the employer against benefit to the employee), but disregard the more critical elements of the specific definitions of "meals in kind" and "furnished on the premises." Using the facts to define these terms seems to be the approach utilized. Consequently, court opinions in effect look only to the doctrine of convenience of employer as a basis for the decisions.

Early decisions under the 1939 Internal Revenue Code did not provide for a §119-type exclusion as did the court decisions under the 1954 Code. Therefore, when the convenience of employer doctrine was applied in the pre-1954 Code cases<sup>42</sup> there was no need to discuss whether the definition of meals included cash allowances or whether the meals should have been on the premises of the employer. Generally, those courts looked at the circumstances of the cases and determined if the cash allowances were paid for the employer's convenience; if they were then the trooper was allowed an exclusion from gross income.

Following enactment of the 1954 Code the courts continued to decide cases solely on the convenience doctrine as developed under the 1939 Code. An attempt to fulfill the Code requirements for meals and premises was unsuccessful. To achieve the statutory goal, *Barrett*<sup>43</sup> broadened the business premises requirement to include "every road and highway" and declared that the premises requirement "not decisive against the excludability" of the allowances.<sup>44</sup>

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41. *Kowalski v. CIR*, 544 F.2d 686 (3rd Cir. 1976), *cert. granted*, 45 U.S.L.W. 3651 (U.S. Mar. 28, 1977) (No. 76-1095); *Smith v. U.S.*, 543 F.2d 1155 (5th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3643 (U.S. Mar. 7, 1977) (No. 76-1243); *U.S. v. Barrett*, 321 F.2d 911 (5th Cir. 1963); *Morelan v. U.S.*, 356 F.2d 199 (8th Cir. 1966); *U.S. v. Keeton*, 383 F.2d 429 (10th Cir. 1967).

42. *Saunders* allowed an exclusion for cash allowances to N.J. troopers; *Magness v. Comm'r*, 247 F.2d 740 (5th Cir. 1957), *cert. denied*, 355 U.S. 931 (1958) (denied exclusion by distinguishing facts from *Saunders*); *Hyslope v. Comm'r*, 21 T.C. 131 (1953) (denied exclusion for Indiana State Trooper who received monthly amount regardless of time on duty).

43. *U.S. v. Barrett*, 321 F.2d 911 (5th Cir. 1963).

44. 321 F.2d 911, 912 (5th Cir. 1963).

The effect was to convert the 1954 Code into the pre-1954 test. Likewise, *Morelan*<sup>45</sup> took the meals in kind requirement and expanded it to include cash allowances by stating that to allow meals only as exclusions would be "straining too much in the interest of efficient tax collection."<sup>46</sup> The court, in effect, rewrote the statute when it used a test of classifying the payments as reimbursements or compensation to decide excludability, rather than using the §119 requirement of meals.<sup>47</sup> The test used in *Morelan* was not a court interpretation of the statute, but a disregard of the terms in the statute. In order to fit the payments within the scope of the statute the courts were, on the surface, applying the statute by redefining the terms "meals" and "business premises" to fit the circumstances of the case. The defect in such an application appears to be that the underlying basis for decisions continued to be the convenience doctrine.

Judicial interpretation using only the convenience doctrine based on the individual facts continued until the Fifth Circuit Court of Appeals in *Wilson v. United States*,<sup>48</sup> recognized for the first time that the proper approach to determining excludability was to read the statute, interpret its meaning irrespective of the factual situation, and then apply the statute to the facts of the case.<sup>49</sup> Eventually, *Koerner* was to use a similar approach in its strict interpretation of §119.

The *Wilson* court read the statute as "excluding the value of any meals furnished to [employee] by his employer for the convenience of the employer, but only if the meals were furnished on the business premises of the employer."<sup>50</sup> The taxpayer, however, wanted the court to read the statute as establishing an exclusion for "the cost of any meals repaid by his employer if for the convenience of the employer the meals were eaten near the taxpayer's place of work."<sup>51</sup> By thus expanding the statute, Trooper Wilson wanted the criteria to be the same as in prior court cases—an application of the convenience doctrine alone. Rather than accept the broadened version of the statute, the court very narrowly construed §119.

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45. *Morelan v. U.S.*, 356 F.2d 199 (8th Cir. 1966).

46. 356 F.2d 199, 203 (8th Cir. 1966).

47. *Id.* at 204.

48. 412 F.2d 694 (1st Cir. 1969).

49. *Id.* at 695-96.

50. *Id.* at 695.

51. *Id.*

The *Wilson* court analyzed the term "meals furnished to him by his employer" and determined that it meant strictly "meals"<sup>52</sup> and not what the taxpayer would consider "meals purchased by him from a third party, the cost of which was ultimately repaid by the employer."<sup>53</sup> After interpreting §119, the court applied the statute in its entirety including "meals in kind" and "on the business premises," emphasizing more than just an application of the convenience of employer test. Thus the *Wilson* court departed from precedent and found that the cash subsistence payments were not an exclusion from income under §119 contrary to what would have been held in the other circuits.<sup>54</sup>

Although the *Wilson* court had a solid basis for its decision, it remained in the minority. When viewed in conjunction with the *Wilson* holding, *Koerner* lends judicial support to the previously non-judicial interpretations of §119. Consequently, after *Koerner* all three branches concur, at least in part, on the interpretation of the statute. Moreover, *Koerner* reaffirms that there should be no departure from a strict interpretation of the Code.

#### *Summary of §119 Interpretation*

Unlike the congressional intent expressed when §119 became law and the unchanging IRS interpretation of the statute, the circuit courts have divided into two opposing views concerning the ex-

52. In an analogous tax court case, *Michael A. Tougher, Jr.*, 51 T.C. 737 (1969), *aff'd per curiam*, 441 F.2d 1148 (9th Cir.), *cert. denied*, 404 U.S. 856 (1971), in which groceries were in question as meals rather than cash payments, the court presented a persuasive distinction between meals and items received in lieu of meals:

[U]nless there is a compelling reason to the contrary the words of a statute must be given their ordinary and usual meaning. . . . The words "meals" connotes to us food that is prepared for consumption at such recognized occasions as breakfast, lunch, dinner, or supper, or the equivalent thereof. It does not ordinarily mean a bag of potatoes, a tin of coffee, a box of salt . . . or an uncooked chicken. . . . In fact, the emphasis in section 119 on the "convenience of the employer" suggests added support for giving the term "meals" its ordinary meaning. When an employer furnishes a "meal" in its normal sense, he can control the time, place, duration, value, and content of the meal to suit his convenience. These elements of potential control, which are strong evidence that the employer's convenience is involved, are lacking in a case such as this one, where the employee merely purchases groceries. Thus it is quite consistent with legislative intent not to extend the term "meals" to include groceries.

*Id.* at 738.

53. 412 F.2d 694, 696 (1st Cir. 1969).

54. *Id.*

cludability of a trooper's cash subsistence allowances. Even after the *Wilson* decision was rendered by the First Circuit, two circuits used the pre-*Wilson* approach of convenience of employer as the primary test. In *Kowalski v. CIR*,<sup>55</sup> the Third Circuit held in favor of an exclusion in accord with the precedent set by its own circuit case, *Saunders v. Commissioner*.<sup>56</sup> Likewise, *United States v. Smith*<sup>57</sup> was decided by the Fifth Circuit after *Wilson*, but the court also followed intra-circuit precedent by upholding the previous Fifth Circuit case, *United States v. Barrett*.<sup>58</sup> However, *Barrett* also based its opinion on the pre-1954 decision of *Saunders*.

From the background of the split in the circuit decisions emerges a clear trend to accurately interpret 119.<sup>59</sup> Circuits from *Barrett* through *Smith* have consistently applied the convenience of the employer test, have erroneously followed a pre-1954 case, *Saunders*, and have broadly interpreted §119. Conversely, the *Wilson* and *Koerner* cases have followed congressional intent expressed by committee reports and the repeal of §120,<sup>60</sup> and in so doing have also applied the IRS interpretation, and have strictly construed the statute as required by the Supreme Court.<sup>61</sup> The end of the exclusion for troopers appears to be near as the Supreme Court first applies the statute to *Kowalski*<sup>62</sup> and, in turn, may apply it to *Smith* and *Koerner*.

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55. 544 F.2d 686 (3rd Cir. 1976), *cert. granted*, 45 U.S.L.W. 3651 (U.S. Mar. 28, 1977) (No. 76-1095).

56. 215 F.2d 768 (3rd Cir. 1954) (decided under the 1939 Code).

57. 543 F.2d 1155 (5th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3643 (U.S. Mar. 7, 1977) (No. 76-1243).

58. 321 F.2d 911 (5th Cir. 1963).

59. A breakdown of circuit court interpretations of §119 as to cash allowances to troopers under the 1954 Code over the years demonstrates the conflicting decisions leading up to *Koerner*:

*Barrett* (5th Cir. 1963) (excludable for Miss. Highway Patrol).

*Morelan* (8th Cir. 1966) (excludable for Minn. State Highway Patrol).

*Keeton* (10th Cir. 1967) (excludable for Colo. Highway Patrol).

*Wilson* (1st Cir. 1969) (includable for N.H. State Police).

*Smith* (5th Cir. 1974) (excludable for Miss. Highway Patrol).

*Kowalski* (3rd Cir. 1976) (excludable for N.J. State Police).

*Koerner* (4th Cir. 1977) (includable for W. Va. State Police).

60. See note 40 *supra*.

61. See *CIR v. Jacobson*, 336 U.S. 28, 49 (1949); *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 49 (1940).

62. 544 F.2d 686 (3rd Cir. 1976), *cert. granted*, 45 U.S.L.W. 3651 (U.S. Mar. 28, 1977) (No. 76-1095).

## CONCLUSION

*Koerner* illustrates the procedure that should be followed as the Supreme Court, in the October 1977 Term, reviews §119 and cash subsistence allowances.<sup>63</sup> In order to strictly apply the statute, the only proper approach is to interpret the meaning of the statutory terms and then apply the facts, rather than looking at the facts to derive the meaning of the statute. Particularly, the Supreme Court will have to look at the statute as a whole including the terms "meals" and "on the business premises." Only after analysis of these terms may the application of the convenience of the employer doctrine be made. Applying the convenience doctrine as the sole test fails to meet the statutory requirements. State troopers should not receive more favorable treatment for cash payments than other taxpayers. Consequently, they should proceed as any other taxpayer would be required, by deducting the payments as travel expenses,<sup>64</sup> if eligible, in order to escape the taxes on the cash subsistence allowances.

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63. After this case comment went to press the United States Supreme Court addressed state police cash subsistence allowances in *CIR v. Kowalski*, 46 U.S.L.W. 4015 (U.S. Nov. 29, 1977) (No. 76-1095). The Court held that:

- a) §119 does not cover cash payments of any kind.
- b) §119 applies only to meals or lodging furnished in kind.
- c) Cash payments are included in income under §61 because to hold otherwise would give cash payments a superior position over meals in kind which are excluded by §119.
- d) Congress decided troopers should not be in a preferred status over other taxpayers when §120 was repealed.

The decision limits a state trooper to including the payments in income and attempting a deduction for ordinary and necessary business expenses within §162.

64. See INT. REV. CODE §162 for the requirements for such deductions.

