

MAINE STATE LEGISLATURE

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JEB Man ✓
March 24, 1976

Richard A. Dieffenbach, State
Controller
Jerome S. Matus, Asst. Atty. Gen.

Bureau of Accounts & Control
Bureau of Taxation

Request for ruling to define reimbursable travel expenses

SYLLABUS:

HISTORICALLY REIMBURSEMENT FOR MEALS TO STATE EMPLOYEES HAS BEEN IN ACCORD WITH AN ADMINISTRATIVE INTERPRETATION OF VARIOUS STATUTORY SECTIONS RELATING TO PAYMENT OF EXPENSES TO STATE OFFICIALS AND EMPLOYEES. THIS OFFICE IS NOT PREPARED TO OVERRULE THE LONG STANDING INTERPRETATION BUT SUGGESTS LEGISLATIVE ACTION IS IN ORDER TO CLARIFY CONFLICTS WITH RULINGS OF FEDERAL COURTS AND THE INTERNAL REVENUE COMMISSIONER. THE COST OF MEALS TAKEN DURING REGULAR WORKING HOURS, WHEN THERE IS NO OVERNIGHT TRAVEL, IF REIMBURSED BY THE STATE TO AN EMPLOYEE, IS TAXABLE INCOME TO THE EMPLOYEE AND SUBJECT TO WITHHOLDING BOTH STATE AND FEDERAL.

FACTS:

You have provided this office with the following factual situation in respect to your request for an opinion.

"The Maine Statutes authorize reimbursement of actual and necessary travel expenses incurred by certain State appointed officials and employees in performance of their duties.

Historically determination of necessary travel expenses has been made by the user department within the guidelines and limitations promulgated by the Department of Finance and Administration (see attached Council Order #16 dated January 16, 1975). Over the years several departments and agencies have permitted reimbursement of the noon meal to certain employees whose duties require them to be away from their residence or official headquarters only during regular working hours.

Generally the cost of meals taken during regular duty hours have been held by the Internal Revenue Service to be the responsibility of the individual rather than the employer. Such reimbursements have been held to be additional compensation for services includible in gross income under Section 61 of the Internal Revenue Code (see attached IRS correspondence dated March 24, 1970)."

QUESTIONS & ANSWERS:

1. Is the cost of the meals taken during the regular working hours a necessary and proper charge to the State? Yes, however see opinion.

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2. If the cost of the meals taken during the regular working hours is properly reimbursable to state employees, is it taxable income subject to withholding? Yes.

REASONS 1:

The facts submitted contain the following statement:
"over the years several departments and agencies have permitted reimbursement of the noon meal to certain employees whose duties require them to be away from their residence or official headquarters only during regular working hours." This reimbursement for noon meals for state employees while traveling away from their residence or official headquarters has been interpreted as being in conformity with the attached "Regulations Regarding Official Headquarters, Expense Accounts, etc." promulgated by the Commissioner of Finance and Administration read and passed by the Executive Council and approved by the Governor. The State Controller is authorized and instructed to enforce same. It may also be fairly assumed that the legislature over the years has been aware of the practice of reimbursing state employees for meals in performance of their official duties even though the employees returned home without staying overnight. This office is not prepared to overrule this historic interpretation of various sections of the Maine statutes relating to meal expenses.

For examples of Maine statutory language relating to payment of expenses see Appendix to this opinion.

It is not necessary that the State of Maine statutes relating to expenses be interpreted by the State of Maine in accord with what the Federal Courts and the Internal Revenue Service have held to be travel expenses for purposes of the Internal Revenue Code. In fact the historic interpretation of our statutes followed by the State Controller is to make reimbursement for meals if paid for by an official, commissioner or employee of the State while in the performance of his official duties and while away from his official headquarters or residence or at points within a reasonable distance therefrom.

The regulations do not specifically state that reimbursement will be made for the meals but reimbursement is properly implied as regulation 3 indicates when reimbursement for meals will not be made.

"3. Only ACTUAL and NECESSARY expenses essential to the ordinary comforts of a traveller in performance of official duties will be reimbursed.

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NO official, commissioner or other employee of the State of Maine shall be reimbursed for any meals or lodgings AT HIS OFFICIAL HEADQUARTERS OR RESIDENCE or at points WITHIN A REASONABLE DISTANCE THEREFROM." (See attached Regulations passed by Council, and by the Governor approved January 16, 1975)

It is certainly arguable that in the performance of his duties an employee can provide his own lunch and it is not necessary for the employee to buy a meal at a restaurant. Nevertheless, regulation 2 contains a fair and proper interpretation of expenses reimbursable under Maine statutes. We shall not contravene the historic interpretation of Maine statutes that eating a meal at a restaurant by a travelling employee is essential to the ordinary comforts of that travelling employee in the performance of his official duties. Thus, the cost of the meal is reimbursable to the travelling employee provided it is not at his official headquarters or residence or at points within a reasonable distance therefrom.

We would suggest that Maine statutes relating to travel expenses require interpretation, which historically has been in favor of reimbursement for meals away from headquarters, it would be helpful to all concerned if the legislature spelled out in specific terms whether or not payment for such meals by an employee is a properly reimbursable expense. The need for definitive legislation would be particularly helpful as the historic interpretation that has resulted in reimbursement for all meals away from officials headquarters or a reasonable distance therefrom is in conflict with a ruling of the United States Supreme Court in respect to travelling expenses under the Internal Revenue Code. We note that there is presently pending before the 127th Legislature, L.D. 2225. Section 11 of that L.D. provides in pertinent part:

". . . Any state employee who travels in-state shall not be reimbursed for noon meals, unless the meal is part of an organized meeting, or program or overnight travel."

REASONS 2:

Although our statutes are being interpreted to permit reimbursement for meals where there is no overnight travel, the reimbursement is clearly income for purposes of the Internal Revenue Code and for purposes of the Maine Income Tax Statutes.

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The Leading Supreme Court Decision in respect to the deductibility of meals is United States v. Correll et ux 389 U.S. 299, 19 LE 2d 537 decided in 1967. In that case the respondent Correll was a travelling salesman for a wholesale grocery company. He would leave his home early in the morning, eat breakfast and lunch on the road and be home in time for dinner at night. He deducted the cost of his breakfast and noon meal as travelling expenses incurred in the pursuit of business while away from home under §162 (a)(2) of the Internal Revenue Code (1954). The Commissioner of Internal Revenue disallowed the deductions and ruled that the expense of Correll's meals was a personal living expense under §262 of the I.R.C. 1954. The United States Supreme Court reviewed the case on certiorari because of a conflict in Circuit Appeal Court decisions and upheld the Commissioner of Internal Revenue's ruling that "travelling expenses" incurred in the pursuit of business "while away from home" which are deductible under §162 (a)(2) of the I.R.C. of 1954 includes the cost of meals only if the trip requires sleep or rest.

In Commissioner of Internal Revenue v. William Bagley, 374 F. 2d (1957) Chief Judge Aldrich for the United States Court of Appeals for the First Circuit held that the cost of meals purchased by the taxpayer was not deductible as a business expense when the taxpayer a consulting engineer maintained his office at home, traveled to employers' places of business generally 30 to 75 miles distant, and consumed the meals prior to arriving home normally around 10 P.M.

In Ralph A. Wilson et ux v. United States of America 412 F. 2d 694 decided in 1969 Chief Judge Aldrich again speaking for the United States Court of Appeals for the First Circuit set forth the facts as follows:

"The facts were undisputed. Taxpayer was a State policeman. He worked a nine hour shift, during which he normally ate one meal. If at mealtime he was more than ten miles away from his home and from his barracks, the required procedure was to eat in any nearby restaurant which had an approved reputation, after reporting in the restaurants telephone number. Taxpayer was subject during mealtime to emergency call back to duty. Calls occurred with some frequency. The cost of the meals away, within a maximum limit, was repaid taxpayer by the state. It is this payment which the commissioner held to be income."

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The Court concluded that the reimbursement for the cost of meals was gross income to the taxpayer and was not excluded under §119 of the I.R.C. of 1954, which section excluded from gross income ". . . The value of any meals . . . furnished to him by his employer for the convenience of the employer, but only if . . . the meals are furnished on the business premises of the employer."

This office has concluded that on the basis of the Bagley & Wilson decisions of the United States Circuit Court of Appeals for the First Circuit and the United States Supreme Court decision in Correll reimbursement by the State to a State official or employee for the cost of meals incurred while on a business trip away from home for the State must be included as gross income in his Federal income tax return unless the trip requires the employee to stay overnight or at least long enough to require rest or sleep.

It follows that the reimbursement for the meals would also have to be included as taxable income for State of Maine income tax purposes as the State of Maine income tax law provides

"The entire taxable income of a resident individual of this State shall be his Federal adjusted gross income as defined in the laws of the United States with the modifications and less the deductions and personal exemptions provided in this chapter." 36 M.R.S.A. §9121

There are no modifications or deductions in respect to meals.

As we have concluded that the reimbursement for the cost of the meals is gross income, the question remains is the amount of reimbursement subject to withholding. Recognizing the administrative difficulties involved to all concerned we must still conclude that the amount of reimbursement is subject to withholding for Federal income tax purposes.

A United States Treasury Regulation in force January 1, 1976 provides:

"The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee." Federal Income Tax Regulation 31.3401 (a)-1(b)(9); Federal Tax Regulations 1976 Vol. 2 United States Code Congressional & Administrative News p. 4018

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It must follow that if the value of the meals is not excludable from the gross income of the employee it is subject to withholding. This conclusion is in accord with the following statement from a leading legal encyclopedia.

"The value of meals and lodging furnished to an employee, if taxable to the employee . . . is subject to withholding." 33 Am Jur 2d 1976 Federal Taxation §633, p. 829

Since the State of Maine's income tax law provides that

"Any 'item' used in this part shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." 36 M.R.S.A. §5102 sub-§11

we must conclude that the amount of the reimbursement for the meals is also subject to withholding for State of Maine income tax purposes.

Jerome L. Matus
Assistant Attorney General

JSM:mb

APPENDIX TO
OPINION RE REIMBURSABLE TRAVEL EXPENSES

<u>Statutory reference</u>	<u>State Officials and Employees</u>
3 M.R.S.A. §163 sub-§15 ". . . He shall receive a salary . . . and necessary travel expenses."	Legislative Finance Officer
7 M.R.S.A. §1 as amended "He shall receive his actual expenses as may be necessary in the performance of his duties."	Commission of Agriculture
9-B M.R.S.A. §211 sub-§2 "The superintendent . . . shall receive all actual travel expenses incurred in the performance of official duties."	Superintendent of Bank & Banking
9-B M.R.S.A. §212 sub-§2A ". . . all employees . . . shall receive their actual expenses incurred in the performance of their official duties."	Employees of the Bureau of Bank and Banking
12 M.R.S.A. §521 "They may be allowed actual necessary travel expenses of travel."	Forest employees & various other employees of the Bureau of Forestry
12 M.R.S.A. §904 ". . . They . . . may be allowed actual necessary expenses of travel."	Agents and representatives of the Baxter State Park Authority
19 M.R.S.A. §1951 "The commissioner shall receive all necessary traveling expenses."	Commissioner of Inland Fisheries & Game
20 M.R.S.A. §2451 sub-§1 ". . . traveling expenses. . . ."	State Director of Driver Education and other Driver Education Personnel

22 M.R.S.A. §1352

Advisory Committee on
Alcoholism & Drug Addiction

". . . committee members, . . . , shall be entitled to receive actual and necessary travel and subsistence expenses while so serving away from their place of residence. . . ."

32 M.R.S.A. §4052 as amended

The Maine Real Estate
Commission

"Each member of the commission shall receive . . . actual and necessary expenses incurred in the performance of duties pertaining to his office."

35 M.R.S.A. §1 as amended

Public Utility Commissioners
and Commission employees

". . . The commissioners and all employees shall receive actual expenses when traveling on official business."

36 M.R.S.A. §486 sub-§3 as amended

Board of Assessment Review

"Board members serving on an abatement appeal shall be entitled to . . . necessary expenses while in actual performance of their duties."

36 M.R.S.A. §55

State Tax Assessor and
his employees

"The reasonable and necessary traveling expenses of the State Tax Assessor and of his employees while actually employed in the performance of their duties, . . . , shall be paid"

State of Maine

16

JAN 16 1975

In Council, _____

Department, Finance and Administration
Bureau of Accounts and Control

ORDERED,

That the attached "Regulations Regarding Official Headquarters, Expense Accounts, etc." promulgated by the Commissioner of Finance and Administration are hereby approved, and that the State Controller is authorized and instructed to enforce same.

STATEMENT OF FACT

This order repeals and replaces Council Order No. 2 dated January 17, 1973, relating to "Regulations Regarding Official Headquarters, Expense Accounts, Etc."



Marie H. Mitchell
State Controller

Read and passed by the Council, and by the Governor approved.

Markham L. Hartley Secretary of State.

"REGULATIONS REGARDING OFFICIAL HEADQUARTERS, EXPENSE ACCOUNTS, ETC."

It shall be the DUTY of each DEPARTMENT HEAD, DIVISION CHIEF, or other person approving expense accounts, to assure themselves that the principles herein set forth are being carried out, both in letter and spirit; and that in all ways only such expense reimbursements are approved by them as ARE FAIR AND JUST TO THE STATE, and equitable in connection with the employee concerned and others.

1. An "Official Headquarters" will be definitely and individually assigned to each employee of the State by the department head concerned. "Official Headquarters" assignments will be established as follows:

(a) In the case of an employee whose duties REQUIRE HIS PRESENCE IN AUGUSTA AT LEAST TWO DAYS EACH WEEK, or where no other point is indicated as proper, AUGUSTA SHALL BE TERMED AS HIS OFFICIAL HEADQUARTERS.

(b) In the case of an employee who is IN THE FIELD virtually all the time and gets to AUGUSTA ONLY ON RARE OCCASIONS, the official headquarters MAY be the place of the personal residence, but only if such will prove ADVANTAGEOUS TO THE STATE and without prejudice to the employee.

(c) In the case of an employee whose official duties require his presence at SOME POINT IN MAINE, OTHER THAN AUGUSTA, such a material portion of his time that it can logically be termed the headquarters of his work for the State, THAT point shall be named as his official headquarters.

2. No official, commissioner or other employee of the State will be reimbursed for any travel expense between HIS OFFICIAL HEADQUARTERS or HIS POINT OF WORK FOR THE STATE and HIS PERSONAL RESIDENCE, except as covered by 4 below.

3. Only ACTUAL and NECESSARY expenses essential to the ordinary comforts of a traveller in performance of official duties will be reimbursed. NO official, commissioner or other employee of the State of Maine shall be reimbursed for any meals or lodgings AT HIS OFFICIAL HEADQUARTERS OR RESIDENCE or at points WITHIN A REASONABLE DISTANCE THEREFROM. When additional expense is incurred by reason of an employee residing in a city or town other than his official headquarters or additional expense is otherwise caused by an EMPLOYEE'S CHOICE of residence such expense IS NOT REIMBURSABLE. Exception in 4 below.

4. Exceptions to 2 and 3 will be made ONLY when (a) a STATUTORY PROVISION EXPRESSLY PROVIDES DIFFERENTLY or (b) when, as in certain State institutions, employees are definitely hired with a condition that house, room or meals be furnished them as a part of their pay, or (c) UNLESS, IN THE OPINION OF THE STATE CONTROLLER, such charges are justified by being cheaper to the State or necessary because of UNUSUAL circumstances.

(Expenditures for meals or lodging at official headquarters or residence are NOT reimbursable as indicated above, but it is permissible to include a charge for a meal that is related to an official meeting authorized by the department head if there is a formal program to be followed.)

5. Every expense account shall show the official headquarters (established as provided in 1 above) and in addition, the town or city in which meals charged to the State were obtained. (The employee must indicate on the travel voucher the NUMBER of meals claimed, if more than one and the number of people.)

6. Reimbursement for use of PERSONALLY OWNED passenger automobiles shall be for miles ACTUALLY AND NECESSARILY travelled on official business; all charges for such travel shall show the point where such travel STARTED AND ENDED and the number of miles travelled. Travel shall be by the most practical route possible and any person travelling by an indirect route shall assume any extra expense incurred thereby.

(Further explanation is in order regarding reimbursement for mileage BETWEEN RESIDENCE and OFFICIAL HEADQUARTERS or POINT OF WORK. It is IMPROPER, ILLEGAL and DISHONEST to claim mileage not actually performed. Therefore, travel reimbursement shall be from official headquarters or residence to place of work, whichever is less. For example, if an employee lives in Gardiner with Augusta as headquarters and leaves from home to go to Portland without coming to Augusta, the proper charge is from Gardiner to Portland and on the return trip if travel terminates at Gardiner, only mileage from Portland to Gardiner is proper.)

7. When it is required that several persons from any agency travel to the same point, reimbursement for the use of personal owned automobiles will be restricted so as to obtain the maximum benefit to the State. When four or less State employees are involved, reimbursement will be for one car; more than four, reimbursement to be made based on the same ration. If a State-owned car is assigned to the agency, a justification as to why this car is not being utilized should be attached to the request for use of personal car for out-of-state travel. This request should also state the number and names of the passengers that will be in the car for which authorization is being requested.

(Reimbursement for out-of-state travel will not be allowed to several members of an agency with each taking their own car. Air fare in lieu of travel expense will not be allowed when several employees from the same agency travel by car unless it is cheaper for the State to do so. IT IS INTENDED THAT THE STATE SHOULD NOT PAY FOR THE COST OF EMPLOYEES' WIVES OR FAMILY, in whole or in part, who attend meetings, conventions, etc.)

8. PRIOR GOVERNOR AND COUNCIL APPROVAL must be obtained if MORE THAN ONE individual from the same department, division, bureau, board, commission or agency is planning to attend the same meeting, convention or conference when said meeting place is located more than 700 miles from Augusta.

(This regulation relates specifically to "meetings, conventions, conferences, educational programs" and is not intended to include law enforcement duties, audits, marketing or other necessary trips.)

9. PRIOR GOVERNOR AND COUNCIL APPROVAL must be obtained for travel to Hawaii, Alaska and other areas outside the continental limits of the United States with the exception of neighboring cities of the Canadian Provinces within a radius of 700 miles of Augusta.

10. All proposed Council Orders regarding travel shall include in the "Ordered Section" the notation: Cost not to exceed \$ _____, including transportation.

11. Reimbursement for use of PRIVATE automobiles for OUT-OF-STATE travel, except to New Hampshire and Vermont, MUST BE APPROVED IN ADVANCE by the State Controller and will not be allowed unless (a) such travel is to the State's advantage, (b) or there are special circumstances in which case Public Utility rates MAY be allowed in lieu of other travel expenses.

It is the policy, therefore, if only one person is travelling to Boston or beyond and wants to take his personal car, actual expense will be allowed only if less than air fare. Air fare in lieu of travel expense will include the price of airplane fare only and will not include meals or lodging enroute, taxi or limousine, tolls parking, etc. When more than one person travels out-of-state in the same car, mileage and actual expense will be allowed if less than total cost of airplane fare as computed below. (Air fare from Augusta to Boston is computed at the lowest fare quoted by the Airlines. Air fare in lieu of travel expense for travel beyond Boston will be computed at jet day coach fare.)

12. All officials or employees of the State of Maine, when travelling by air beyond Boston, shall request other than first class accommodations. Travel by common carrier should be at THE MOST ECONOMICAL AND PRACTICAL RATE. Advantage should be taken of excursion fares, businessman flights, etc. Air travel orders should be obtained through the Bureau of Accounts and Control whenever possible. Any charges for FIRST CLASS air transportations beyond Boston WILL NOT BE ALLOWED except in most unusual circumstances.

13. The use of STATE-OWNED VEHICLES for NON-OFFICIAL TRAVEL or for personal purposes WILL NOT be allowed. Transportation to personal residence shall be deemed to be official travel, if made for the purpose of storing a State-owned vehicle.

14. NO STATE-OWNED VEHICLE will be assigned or its present assignment continued to any official or employee of the State violating the provision of 13 above or to one whose necessary duties for the State fail to require a MATERIAL amount of travel on State business, entirely apart and aside from transportation between the official headquarters and personal residence of the employee.

15. No official or employee of the State of Maine will be reimbursed for use of RENTAL CARS unless use of such car rental is specifically in the BEST INTEREST OF THE STATE.

16. No official or employee of the State of Maine may recover expenses for pullman car service in excess of roomette rate. REIMBURSEMENT FOR OVERNIGHT BAGS, BRIEF CASES, DESK SETS, DRUGS AND OTHER ITEMS OF PERSONAL NATURE SHALL NOT BE MADE.

(Other items of a PERSONAL NATURE that are NOT allowed include laundry, cleaning, pressing and valet service. Reimbursement for gifts such as flowers

or candy, etc., in lieu of lodging costs are also prohibited. Invoices for flowers sent to the sick or to funerals and also the purchase and mailing of Christmas cards are considered items of a personal nature not to be paid for by the State).

17. Reimbursement for hotel room charges incurred in travel will be limited to an amount not to exceed \$30.00 per day WHERE NECESSARY. These daily amounts are maximums and are not to be considered as per-diem amounts.

18. Supporting receipts shall be attached to all expense accounts for pullman car fares, airplane fares, boat fares, tolls, auto storage and parking (except parking meters), hotel and lodging (when accommodations are on American plan and the daily charge exceeds \$40.00 per person, the receipts must indicate the amount applicable for room charge only.)

(No reimbursement will be made for items referred to above unless a receipt is attached to the expense voucher. Exceptions to this policy will be tolls costing 25 cents or less.)

19. Reimbursement for lodging where one State Official or employee travels on official State business shall not exceed the single room rate and subject also to limitations of item 17 above.

(This regulation is to clarify the situation for those who take members of their family to meetings or conventions. If, for example, the double occupancy rate is \$30.00 and the single rate for that room is \$15.00, reimbursement will be allowed for the amount of \$15.00, if the single room rate is indicated on the receipted bill, otherwise 3/4 of the double occupancy rate may be allowed.)

20. Rates allowed for use of trailers as substitute for other lodging and meals shall be \$7.00 per day - not to exceed \$35.00 per week.

21. Whenever it shall be necessary to effect THE TRANSFER OF AN EMPLOYEE of the state, including promotion, from one official station to another by direction of the department head, said employee shall be reimbursed for his reasonable and necessary moving expense actually incurred. NO SUCH EXPENSE SHALL BE ALLOWED UNLESS the transfer is made FOR THE CONVENIENCE OF THE STATE and in no event where it is effected for the convenience or at the request of the employee.

22. When reimbursement for travel expense is provided by some other agency or industry, either in whole or in part, duplicate reimbursement shall not be made by the State of Maine.

(It is obvious that it is dishonest to charge the State for expenses that are reimbursed from other sources.)

23. Employees may be reimbursed for necessary authorized travel expenses; within limitations permitted by law, regulations as given above, and availability of funds; however no expense of a personal nature or for members of the employee's family should be a part of any expense voucher submitted for reimbursement.

24. It is intended that these "REGULATIONS REGARDING OFFICIAL HEADQUARTERS, EXPENSE ACCOUNTS, ETC." apply not only to State Officials and employees but shall also include members of boards, commissions, etc. It is also intended they apply to ALL FUNDS.

25. The Governor and Council shall have the final decision in any dispute or question concerning travel at state expense.

US Treasury Department

RECEIVED

MAR 25 1970

STATE OF MAINE
BUREAU OF ACCOUNTS & CONTROL

Internal Revenue Service
68 Sewall St., Augusta, Maine 04330

March 24, 1970

H. L. Cranshaw, Controller
State Department of Finance and
Administration
State House
Augusta, Maine 04330

Dear Mr. Cranshaw:

The following quotation from Revenue Ruling 70-85, published February 16, 1970 in Internal Revenue Bulletin 70-7, is furnished for your information and guidance:

"Cash allowances or reimbursements to State Police who are not 'traveling away from home', and hence are not considered by the Internal Revenue Service to be in a travel status, for meals are compensation for services and includible in gross income under section 61 of the Internal Revenue Code. See *Ralph A. Wilson v. United States*, 412 F. 2d 694(1969), Ct.D. 1930 in which the United States Court of Appeals for the First Circuit held that reimbursements to a state policeman for the cost of meals while on duty were includible in gross income. Taxpayer did not seek certiorari in that case.

"Consistent with that holding, it is held that amounts paid to members of the State Police as reimbursement or allowance for the cost of meals while on daily patrol or on other regular duty assignments and while not in a travel status are subject to withholding of income tax under section 3402 of the Code".

We are enclosing an extra copy of Internal Revenue Bulletin 70-7. The Revenue Ruling is on page 21 and the Wilson decision begins on page 7.

Sincerely yours,



WHITNEY L. WHEELER
District Director

Enclosure

the AAFES stands in the same position in relation to the Department of Defense as the United States Post Exchanges stood in relation to the War Department. Therefore, a pension system established by the AAFES is established by the United States.

Accordingly, it is held that the annuity the taxpayer received pursuant to the retirement plan for civilian employees of the AAFES is an amount received under a public retirement system for purposes of section 37(c) (2) of the Code.

Section 61.—Gross Income

26 CFR 1.61-1: Gross income.

Reimbursements to state policemen for cost of meals incurred more than ten miles away from home. See Ct. D. 1930, below.

26 CFR 1.61-2: Compensation for services, including fees, commissions, and similar items.

A tenant farmer is not required to include any amount in income as a result of his occupancy of a dwelling furnished by the land owner under the usual tenant farmer arrangement.

Rev. Rul. 70-72

Tenant farmer taxpayers generally enter into arrangements with the owners of farm land under which each tenant farmer is entitled to occupy a dwelling situated on the property being farmed. These arrangements more nearly resemble contracts between independent parties than between employers and employees.

Held, in the usual tenant farmer arrangement referred to above no amount is includable in the tenant farmer's gross income as a result of his occupancy of the dwelling.

Section 119.—Meals and Lodging Furnished for the Convenience of the Employer

26 CFR 1.119-1: Meals and lodging furnished for the convenience of the employer.

(Also Section 61; 1.61-1.)

Reimbursements to state policemen while on regular duty for costs of meals incurred more than ten miles away from home are includable in gross income.

Ct. D. 1930

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7282

*Ralph A. Wilson and Joanne B.
Wilson, his wife,*

v.

United States of America

[412 F. 2d 694]

*Appeal from the United States District
Court for the District of New Hampshire*

Before ALDRICH, Chief Judge, Mc-
ENTEE and COFFIN, Circuit Judges.

Fred W. Hall, Jr., with whom *C.
Russell Shillaber and Cooper, Hall &
Walker* were on brief, for appellants.

Edward Lee Rogers, Attorney, De-
partment of Justice, with whom *John-
nie M. Walters*, Assistant Attorney
General, *Lee A. Jackson and Karl
Schmeidler*, Attorneys, Department of
Justice, and *Louis M. Janelle*, United
States Attorney, were on brief, for
appellee.

[June 24, 1969.]

ALDRICH, Chief Judge. This case, involving income tax consequences of reimbursement for the cost of a meal away from home, in a broad sense takes up where we left off in *Commissioner v. Bagley*, 1 Cir., 1967, 374 F. 2d 204,

cert. denied 389 U.S. 1046.¹ In *Bagley* we held that the Commissioner correctly determined that the cost of a meal during a single business day's travel away from home was a personal expense and not a business deduction under 1954 I.R.C. § 162(a)(2). In the case at bar the taxpayer was reimbursed by his employer for the cost of such meals, and the Commissioner included the payment in his gross income. Taxpayer² paid the tax and sued in the district court for its recovery. The court denied relief, D.N.H., 1968, 292 F.Supp. 200, and taxpayer appeals.

The facts were undisputed. Taxpayer was a state policeman. He worked a nine hour shift, during which he normally ate one meal. If at mealtime he was more than ten miles from his home and from his barracks, the required procedure was to eat in any nearby restaurant which had an approved reputation, after reporting in the restaurant's telephone number. Taxpayer was subject during mealtime to emergency call back to duty. Calls occurred with some frequency. The cost of these meals away, within a maximum limit, was repaid taxpayer by the state. It is this payment which the Commissioner held to be income.

We start with the proposition that all remuneration received for services is gross income unless it falls within a specific exclusion. The statute upon which taxpayer relies, 1954 I.R.C. § 119, excludes " * * * the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if * * * the

¹ The conflict in the circuits created by our decision in *Bagley* was resolved in favor of the Commissioner's "sleep or rest" rule, approved in *Bagley*, by *United States v. Correll*, 1967, 389 U.S. 299 [Ct. D. 1917, C.B. 1968-1, 64].

² We speak of taxpayer in the singular, the wife being a party only by virtue of a joint return.

meals are furnished on the business premises of the employer."³

Taxpayer would have this read, " * * * the cost of any meals repaid by his employer if for the convenience of the employer the meals are eaten near the taxpayer's place of work." Each of these transpositions, individually, enlarges the scope of the exclusion, and cumulatively they enlarge it entirely beyond its intended meaning. Rather, we agree with the Commissioner that the statute means, and therefore is limited to, meals served in kind on the employer's business premises. We find this interpretation supported by the language, the intentment, and the relevant legislative history.

First, the language, "the value * * * of any meals * * * furnished to him by his employer * * * but only if furnished on the business premises of the employer." Quite apart from the fact that reimbursement of what is a personal and not a business expense would presumptively be income, exclusions and deductions from gross income, being acts of grace, are to be narrowly construed. *Commissioner v. Jacobson*, 1949, 336 U.S. 28, 49 [Ct. D. 1712, C.B. 1949-1, 40]; *Interstate Transit Lines v. Commissioner*, 1943, 319 U.S. 590, 593 [Ct. 1586, C.B. 1943, 1016]; *United States v. Stewart*, 1940,

³ "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—

(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."

311 U.S. 60, 70-71 [Ct. D. 1466, C.B. 1940-2, 199].

The term "business premises" is one of great specificity. As Judge Raum said in *Gordon S. Dole*, 1965, 43 T.C. 697, 707 [Acquiescence, C.B. 1966-2, 4] *aff'd*, *Dole v. Commissioner*, 1 Cir., 1965, 351 F. 2d 308, "The statute does not say 'at some convenient or reasonably accessible place.' It says 'on the business premises of the employer.'" The state conducted no business in the public restaurant. Nor was taxpayer performing, or going to perform, any business there. Even if we were to accept the broad definition of *Commissioner v. Anderson*, 6 Cir., 1966, 371 F. 2d 59, 67, *cert denied* 387 U.S. 906 (an over-liberality occasioned, we believe, by deference to the pre-*Correll* meal cases cited *infra*) the restaurant was not "a place where the employee performs a significant portion of his duties." Rather, taxpayer was there because he was off duty.

We see no difference in substance between taxpayer and any travelling man whose assigned "territory" is a large geographical area. Taxpayer's metaphysical concept that his employer is the state, and the state "owns" all that is within its borders, does not advance his case. Even outright ownership of property does not make it "business premises," *Commissioner v. Dole, supra*. We are again reminded of Judge Raum's remarks.

"The furnishing of tax-free food and lodging to corporate officers or other employees was susceptible of abuse, and the tests applied to determine the tax-free character of the food or lodging were unsatisfactory; accordingly, section 119 was enacted in the 1954 Code to spell out with particularity the restrictive conditions under which such exceptional tax treatment would be permitted. * * * These words mean what they say and

should not be given any strained or eccentric interpretation so as to frustrate what the Legislature obviously tried to achieve." *Gordon S. Dole, supra* at 707-08.

While the business premises requirement is sufficient to dispose of the case, because of its general importance we deal with the Commissioner's claim that the statute requires meals to be furnished in kind.⁴ We consider this entirely correct. "[M]eals * * * furnished to him by his employer" is a far more restrictive concept than meals purchased by him from a third party, the cost of which is ultimately repaid by the employer. What the statute speaks of as furnished is the meals, not the cost; furnishing means supplying, or serving, not paying. Indeed, "cost" is not even referred to, but "value," a word more consistent with appraisal than monetary payment.⁵ And, again, furnishing meals on premises is not the seeming equivalent of a financial transaction.

Turning to the intentment of the statute, when one looks to its purpose there are special reasons for not taking the "value" of meals furnished in kind that do not apply to the receipt of cash payments. Not only is the mechanical difficulty of determining the monetary value of a meal large in comparison with the tax revenue involved, but from the standpoint of the employee the employer's compulsory control of the "place, duration, value and content of the meal," *Michael A.*

⁴ Regulations § 1.119-1(c)(2).

⁵ While the term "value" may, as taxpayer contends, be broad enough to include a reimbursement in cash, its preliminary meaning in this context must be, as stated in Webster's Third New International Dictionary, "the monetary worth of something; the marketable price usually in terms of a medium of exchange." Elsewhere, when Congress wished to include both money and something other than money, it used dual terminology. See 1954 I.R.C. §§ 107 and 117.

Tougher, Jr., 1969, 51 T.C. No. 73, may substantially reduce his freedom and enjoyment; and hence its value to him.⁶ These practical differences well warrant a difference in tax treatment. We should not, absent some strong reason, seek a construction that removes them.

Finally, should any doubts exist as to the "in kind" requirement from the statutory language and its purpose, we find them clarified by the legislative history. Both the House and Senate Committee Reports state that section 119 "applies only to meals or lodging furnished in kind." H.R.Rep. No. 1337, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News (1954) at 4017); S. Rep. No. 1622, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News (1954) at 4825). Thus we have a case where history, sense and language all coincide.

We are aware of the fact that a number of courts have reached a different conclusion. See *United States v. Barrett*, 5 Cir., 1963, 321 F. 2d 911; *United States v. Morelan*, 8 Cir., 1966, 356 F. 2d 199; *United States v. Keeton*, 10 Cir., 1967, 383 F. 2d 429. See also *Saunders v. Commissioner*, 3 Cir., 1954, 215 F. 2d 768. With due respect, we do not find them persuasive. It may be noted, also, that all were decided before *United States v. Correll*, *supra*, n. 1, at a time when the prevalent view was that a business meal away from home was to be differently treated. We regard the present case as even clearer for the government than *Correll*.

Affirmed.

⁶ In *Tougher, Jr.*, in holding that supplying groceries was not furnishing a meal the Tax Court also pointed out that furnishing a meal in kind on its business premises was strong evidence that the employer's business convenience was served, as distinguished from a mere attempt to supply tax-free income to the employee. We need not deal, however, with this requirement of the statute.

Section 152.—Dependent Defined

A written child dependency agreement between divorced parents executed after the taxable year in which child support payments were made by the noncustodial parent but within the statutory period for filing a claim for refund meets the requirement of section 152(e)(2)(A)(i) of the Code.

Rev. Rul. 70-73

A divorce decree was silent as to whether the husband or wife was entitled to claim the dependency exemption for their minor child. During all of 1967 the child was in the wife's custody and the husband furnished more than \$600 but less than 1,200 towards the child's support. In June of 1968 a written agreement between the husband and the wife certified that during 1967 the husband had contributed more than one-half of their child's support, that no other person had claimed credit for the child's dependency exemption, and that the husband was entitled to the deduction under section 151 of the Internal Revenue Code of 1954 for such child. Held, the written agreement executed after the taxable year but within the statutory period during which the taxpayer may file a claim for refund for 1967 meets the requirement of section 152(e)(2)(A)(i) of the Code and, therefore, the husband is entitled to claim a dependency exemption for his child.

Section 172.—Net Operating Loss Deduction

26 CFR 1.172-1: Net operating loss deduction.

Net operating losses of a corporation are not affected by a reduction in its capitalization approved by State authorities; I.T. 1935 superseded.

Section 3402.—Income Tax Collected at Source

*26 CFR 31.3402(a)-1: Requirement of withholding.
(Also Section 3401; 31.3401(a)-1.)*

Amounts paid to State policemen as reimbursements or allowance for cost of meals while on regular duty and while not in a travel status are subject to withholding of income tax.

Rev. Rul. 70-85

Advice has been requested whether withholding of income tax is required with respect to amounts paid to members of the state police as reimbursement or allowance for the cost of meals while on daily patrol duty or on other regular duty assignments and while not in a travel status.

Section 3402 of the Internal Revenue Code of 1954 imposes the requirement of withholding Federal income tax upon every employer making payment of "wages", as defined in section 3401 (a) of the Code.

Section 31.3401(a)-1 of the Employment Tax Regulations provides, in part, that the term "wages" means all remuneration for services performed by an employee for his employer, unless specifically excepted. Section 31.3401(a)-1(b)(9) of the regulations provides that the value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee.

Cash allowances or reimbursements to state police who are not "traveling away from home", and hence are not considered by the Internal Revenue Service to be in a travel status, for meals are compensation for services and includible in gross income under section 61 of the Code. See *Ralph A.*

Wilson v. United States, 412 F. 2d 694 (1969), Ct. D. 1930, page 7, this Bulletin, in which the United States Court of Appeals for the First Circuit held that reimbursements to a state policeman for the cost of meals while on duty were includible in gross income. Taxpayer did not seek certiorari in that case.

Consistent with that holding, it is held that amounts paid to members of the state police as reimbursement or allowance for the cost of meals while on daily patrol or on other regular duty assignments and while not in a travel status are subject to withholding of income tax under section 3402 of the Code.

Section 6103.—Publicity of Returns and Disclosure of Information as to Persons Filing Income Tax Returns

26 CFR 301.6103(a)-101: Inspection of returns by committees of Congress other than those enumerated in section 6103(d).

E.O. 11505

INSPECTION OF INCOME, EXCESS-PROFITS, ESTATE, AND GIFT TAX RETURNS BY THE SENATE COMMITTEE ON THE JUDICIARY

By virtue of the authority vested in me by section 6103(a) of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6103(a)), it is hereby ordered that any income, excess-profits, estate, or gift tax return for the years 1960 to 1969, inclusive, shall, during the Ninety-first Congress, be open to inspection by the Senate Committee on the Judiciary or any duly authorized subcommittee thereof, in connection with its investigation of the administration, operation, and enforcement of the Internal Security Act of 1950 and other internal security laws, pursuant to Senate Resolution 46, 91st Congress, agreed to February 17, 1969,