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## Traveling Expenses to Temporary Job Sites Kohr v. United States Walraven v. Commissioner

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**TRAVELING EXPENSES TO TEMPORARY JOB SITES**  
**KOHR v. UNITED STATES**  
**WALRAVEN v. COMMISSIONER**

The issue addressed in this update is the current status of the deductibility of traveling expenses to temporary job sites. The analysis is a comparison of two recent cases: *Kohr v. United States*<sup>1</sup> and *Walraven v. Commissioner*.<sup>2</sup> *Kohr* involves the granting of a summary judgment in favor of the taxpayer from the District Court. In *Walraven*, the Eighth Circuit affirmed a Tax Court ruling in favor of the Commissioner of Internal Revenue.

Both cases involve construction workers who maintained residences that were considerable distances from their employment. Both were employed at a nuclear power plant construction project, and both claimed a deduction for travel and/or living expenses incurred while away from their residences. In both cases, the taxpayers asserted that the deductions were valid because their jobs were of a temporary nature.

**THE LAW**

The relevant statutory provisions are Internal Revenue Code Sections 162(a)<sup>3</sup> and 262.<sup>4</sup> Generally, the Internal Revenue allows no deductions for living and travel expenses incurred while going to and from work because they are considered to be personal expenses under Section 262.<sup>5</sup> An exception to this rule is to allow a deduction under the general language of Section 162(a). A deduction is allowed if the expenses are “ordinary and necessary” and incurred while “carrying on a trade or business.”<sup>6</sup> In cases such as *Kohr* and *Walraven*, expenses incurred while traveling to a distant job site are subject to a “temporary or indefinite” test to determine deductibility.<sup>7</sup> Simply stated, there is a deduction for expenses incurred while traveling from the residence to the place of “temporary” employment, but there is *no* deduction when the employment is of indefinite duration. This test has historically rejected any consideration of the subjective intentions of the taxpayer and centered solely on the job itself.<sup>8</sup>

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<sup>1</sup>*Kohr v. United States*, 655 F.Supp. 306 (M.D.Pa. 1987).

<sup>2</sup>*Walraven v. Commissioner*, 815 F.2d 1246 (8th Cir. 1987).

<sup>3</sup>28 U.S.C. Sec. 162(a) provides in part, “In general - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, ....”

<sup>4</sup>26 U.S.C. Sec. 262 provides, “Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.”

<sup>5</sup>Expenses incurred in commuting are personal because they result from the taxpayer’s desire to maintain his residence at a place other than where his employer’s business was located. *Commissioner v. Flowers*, 326 U.S. 465 (1946).

<sup>6</sup>(a).

<sup>7</sup>*Peurifoy v. Commissioner*, 358 U.S. 59, 60 (1958).

<sup>8</sup>*Frederick v. United States*, 603 F.2d 1292, 1295 (8th Cir. 1979).

## COMPARISON OF THE CASES

As previously stated, both the *Kohr* and *Walraven* cases had many similarities, but had different outcomes for the taxpayer. Although the results were correct in both cases, but the opinion in the *Kohr* case appears to break new ground for the "temporary or indefinite" test.

The result was probably correct in each case because the courts require that the analysis be made from the totality of the circumstances of the particular case.<sup>9</sup> If the facts of the taxpayer's situation indicate that it is reasonable for the taxpayer to believe that the employment is only for a temporary period, then the choice to maintain a residence away from the job site is not a personal choice but a business choice.<sup>10</sup> In *Walraven*, the Tax Court concluded that it was not reasonable for the taxpayer to believe that his employment was temporary.<sup>11</sup> The court based its decision on a narrow set of facts. The project was large, the taxpayer was aware of extensions in the project and the taxpayer turned down short-term jobs near his residence. On appeal, the Eighth Circuit determined that this ruling was "not clearly erroneous"<sup>12</sup> and that "it reasonably appeared that there was a high probability for the job to continue indefinitely."<sup>13</sup> The court affirmed the disallowance of the deductions.<sup>14</sup>

In *Kohr*, the facts were different. The taxpayer was working on a project that was under the constant threat of termination. Also, the taxpayer was working outside of his union's jurisdiction and could have lost his job at any time to anyone from the local union that wanted it. For these reasons it was reasonable for the taxpayer to conclude that his employment was temporary.

At this point, a difference between the cases emerges. In *Kohr*, the court noted a relevant point: the taxpayer had represented that his economic and family ties with his town were strong and that he "continued to seek out jobs in his local union's

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<sup>9</sup>*Peurifoy*, 358 U.S. at 61.

<sup>10</sup>The Eighth Circuit in *Frederick* explained the test: "[T]he temporary or indefinite test serves a similar function in the §162(a) context in attempting to discern whether transportation expenses were incurred for a business purpose rather than a personal one. The underlying premise in both situations is the idea that a taxpayer's choice of residence is circumscribed by his expected term of employment. A taxpayer has considerable discretion in determining where he wants to live when he will be employed in a location for a substantial or indefinite period of time. This discretion is severely limited or nonexistent when a taxpayer will be employed for only a short or temporary period of time. Thus, the choice of a residence is a personal decision in the first situation, and a business decision in the latter." *Frederick*, 603 F.2d at 1295.

<sup>11</sup>*Walraven v. Commissioner*, 55 T.C.M.(P-H) 855, 858 (1986).

<sup>12</sup>*Walraven*, 815 F.2d at 1248.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

jurisdiction shows this *continuing desire*,<sup>15</sup> to remain in his hometown. This would seem to indicate that the taxpayer's desire to retain his residence is a factor the courts should consider. This idea was specifically rejected in *Walraven*<sup>16</sup> and other prior cases.<sup>17</sup> In *Walraven*, the court stated that any consideration of the "taxpayer's personal expectations and intentions with respect to his employment would miss the point of the test."<sup>18</sup> The "temporary or indefinite test" focuses on the job itself and its expected duration.<sup>19</sup> Facts are only relevant as they relate to "the taxpayer's expectation for continued employment."<sup>20</sup>

### CONCLUSION

The current status of the law in this area is that there is a deduction for expenses incurred while traveling to a temporary workplace. If the expenses are to qualify for the deduction, then it must be reasonable for the taxpayer to believe that his employment is temporary. In making this determination, notwithstanding the taxpayer's "continuing desire" as cited in *Kohr*, the court will not consider the taxpayer's subjective intent or expectations.

Any such subjective intent would "miss the point of the test," therefore, the language in *Kohr* probably will not garner much judicial clout. Reliance on subjective intent will probably show up in situations, such as in *Kohr*, where the court had more than enough objective facts to determine that the employment was temporary. In such a case, as in *Kohr*, "reliance" upon subjective facts would probably be cumulative, or conclusory, if not superfluous.

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<sup>15</sup>*Kohr*, 655 F.Supp. at 310, (Emphasis added).

<sup>16</sup>*Walraven*, 815 F.2d at 1248.

<sup>17</sup>See *Frederick*, 603 F.2d at 1295; *Weiberg v. Commissioner*, 639 F.2d 434, 437 (8th Cir. 1981); *Ellwein v. United States*, 778 F.2d 506, 510 (8th Cir. 1985).

<sup>18</sup>*Walraven*, 815 F.2d at 1248; see also *Cockrell v. Commissioner*, 321 F.2d 504, 506-507 (8th Cir. 1963).

<sup>19</sup>*Frederick*, 603 F.2d at 1295.

<sup>20</sup>*Id.* at 1295-96.

