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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-318
of	:	JANUARY 21, 1981
GEORGE DEUKMEJIAN Attorney General	:	
Edmund E. White Deputy Attorney General	:	

The Honorable Gerald N. Goldberg, Executive Officer, Franchise Tax Board, requests an opinion on the following question:

May members and former members of the Legislature, with respect to state income taxes, exclude or deduct from taxable income for the years prior to 1977, the living allowance paid to them pursuant to section 8902 of the Government Code, upon their making the election authorized by Statutes 1977, chapter 1079, section 152, if such legislator commuted daily to the State Capitol from his district office so as to not be away from his district overnight?

CONCLUSION

Members and former members of the Legislature, with respect to state income taxes, may exclude or deduct from taxable income for the years prior to 1977 the living allowance paid to them pursuant to section 8902 of the Government Code, upon their making the election authorized by Statutes 1977, chapter 1079, section 152, irrespective of

whether such a legislator commuted daily to the State Capitol from his district office so as to not be away from his district overnight.

ANALYSIS

On March 20, 1979, we issued our opinion CV 78/6, I.L. 79–3 2, concluding, in part, that with respect to state income taxes, members and former members of the Legislature, who represented districts encompassing Sacramento and the immediately surrounding area and who commuted daily to the State Capitol, may elect under section 152, Statutes 1977, chapter 1079, to exclude or deduct from taxable income, for years prior to January 1, 1977, the living allowance paid to them pursuant to section 8902 of the Government Code.

We have been requested to reconsider that conclusion in the light of a decision of the federal Tax Court, interpreting federal income tax provisions, holding that a state legislator is eligible for the deduction for living expenses from his taxable income only when he is away from the tax home designated by the state legislator, as permitted by section 604 of the federal Tax Reform Act of 1976. (See *Eugene A. Chappie and Pauline Chappie, Petitioners v Commission of Internal Revenue*, *Respondent*, Docket No. 56 16–78; 73 Tax Court 2757, No. 66, Dec. 36, 766 filed Feb. 11, 1980.)

We noted in our prior opinion that the state Legislature, in enacting section 152, Statutes 1977, chapter 1079, intended to remedy a state income tax inequity in a manner comparable to the remedy fashioned by Congress with respect to the identical factual situation but pertaining to the federal income tax provisions. We thereafter concluded that that state law did not require that the legislator be away from home overnight–prior to January 1, 1977–in order to be able to deduct from state taxable income, the living allowance paid pursuant to section 8902 of the Government Code.

The federal Tax Court, in interpreting the comparable federal income tax provision, held that the legislator must be away from home overnight in order to take the consequent deduction from his federal income. The question arises whether we correctly interpreted state law under the circumstance that state law with respect to state income taxes generally follows federal law with respect to federal income taxes, thus creating an inference that state law also requires that the legislator be away from home overnight, prior to 1977, in order to claim the deduction with respect to his state income. In this instance, that inference is not justified.

Before we turn to the federal statute and the federal Tax Court decision, we set forth the relevant state statute, section 152 of Statutes 1977, chapter 1079, which provides in part as follows:

"(a) For purposes of Section 17202 of the Revenue and Taxation Code, in the case of any individual who was a member of the State Legislature at any time during any taxable year beginning before January 1, 1977, and who elects the application of this section, for any period during such a taxable year in which he was a state legislator-

"(1) The place of residence of such individual within the legislative district which he represented shall be considered his home, and

"(2) He shall be deemed to have expended for living expenses (in connection with his trade or business as a legislator) an amount equal to the sum of the amounts determined by multiplying each legislative day of such individual during the taxable year by the amount generally allowable with respect to such day to employees of the executive branch of the federal government for per diem while away from home but serving in the United States, as specified in Section 5702 of Title 5 of the United States Code, as it read on July 1, 1977."

The comparable federal tax provision is that contained in section 604 of the 1954 Internal Revenue Code, as added by the Tax Reform Act of 1976, which reads as follows:

"(a) In General.—For purposes of section 162(a) of the Internal Revenue Code of 1954, in the case of any individual who was a State legislator at any time during any taxable year beginning before January 1, 1976, and who elects the application of this section, for any period during such a taxable year in which he was a State legislator-

"(1) the place of residence of such individual within the legislative district which he represented shall be considered his home, and

"(2) he shall be deemed to have expended for living expenses (in connection with his trade or business as a legislator) an amount equal to the sum of the amounts determined by multiplying each legislative day of such individual during the taxable year by the amount generally allowable with respect to such day to employees of the executive branch of the Federal Government for per diem while away from home but serving in the United States.

"(b) Legislative Days.—For purposes of subsection (a), a legislative day during any taxable year for any individual shall be any day during such year on which (1) the legislature was in session (including any day in which the legislature was not in session for a period of 4 consecutive days or less), or (2) the legislature was not in session but the physical presence of the individual was formally recorded at a meeting of a committee of

such legislature.

"(c) Limitation.—The amount taken into account as living expenses attributable to a trade or business as a State legislator for any taxable year under an election made under this section shall not exceed the amount claimed for such purpose under a return (or amended return) filed before May 21, 1976.

"(d) Making and Effect of Election.—An election under this section shall be made at such time and in such manner as the Secretary of the Treasury or his delegate shall by regulations prescribe. Any such election shall apply to all taxable years beginning before January 1, 1976, for which the period for assessing or collecting a deficiency has not expired before the date of the enactment of this Act."

It may be observed that both section 1 52(a)(2) of the state statute, *supra*, and section 604(a)(2) of the federal statute contain the identical phraseology, to wit:

> "[H]e shall be deemed to have expended for living expenses . . . an amount equal to the sum . . . generally allowable with respect to . . . employees of the executive branch of the federal government for per diem *while away from home* . . .

The federal Tax Court dealt with that language in the following manner:

> "For the state legislator who elects application of this provision, the place of residence within the legislative district which he represents shall be considered his tax home. Additionally, he shall be deemed to have expended a prescribed amount, as living expenses during 'legislative days.'
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> "Petitioner has raised the question of whether the amount of per diem shall be deemed to have been expended only when the state legislator is away from his home, i.e., the tax home elected under section 604 within the legislative district he represents. Also at issue is the question of what constitutes a 'legislative day' under section 604.
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> "Petitioner contends that the 'away from home' requirements of section 162 are not incorporated in section 604, but rather that the phrase is used merely to describe the amount of per diem deemed expended under the statute.
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> "Petitioner further argues that once a taxpayer elects the application of the statute, he 'shall' be deemed to have expended the amount of per diem

as his living expenses provided that per diem does not exceed Federal allowances. Petitioner argues that the statute contains no contingencies or exceptions to this rule once the election is made.

"Petitioner therefore argues that he is entitled to a deduction under the statute in the amount of $5,000.00 for the year 1973 and $4,500.00 for the year 1974.

"Section 604 was enacted to alleviate the uncertainty under former law with respect to the tax home of state legislators. A deduction under section 162(a) has always been permitted to legislators (as well as to all other taxpayers) for traveling expenses (including amounts expended for meals and lodging) while away from home in pursuit of a trade of [sic] business. No deductions are permitted under this provision for personal, living, and family expenses. Section 262.

"Because deductions under section 162(a) were permitted only while 'away from home,' the determination of the tax home of a taxpayer was crucial. Prior law determined the tax home of a legislator by taking into account a number of facts and circumstances, such as: (a) the total time ordinarily spent by the taxpayer at each location, (b) the degree of business activity at each location, and (c) the amount of income ordinarily earned by the taxpayer at each location. Additional factors of a similar nature could be taken into consideration, such as the significant contacts of the taxpayer at each location. Since each case was determined separately under this facts and circumstances test, there was no certainty for legislators as to what would be determined to be their tax home and their resulting 'away from home' deductions. See H. Rept. No. 658, 94th Cong., 1st Sess., 179 (1975). To make matters worse, the Internal Revenue Service would not issue an advance ruling on the question of an individual legislator's tax home. See H. Rept. No. 658, 94th Cong., 1st Sess., 179 (1975) and S. Rept. No. 938, 94th Cong., 2d Sess., 166 (1976).

"The sessions of many legislatures had become substantailly [sic] lengthened requiring members to spend substantial portions of each year in the state capital. Many legislatures began to provide a per diem for each day a legislator was in attendance at a session of the legislature; therefore, the determination of a legislator's tax home became crucial to the determination of whether that legislator would be eligible for an away from home deduction for his traveling expenses while at the state capital.

"Many state legislators had been treating their residences in the districts they represented as their tax homes. Thus, they would deduct the living expenses incurred in connection with the time spent at the state capital.

"At the time section 604 of the Tax Reform Act of 1976 was enacted, the Internal Revenue Service was challenging these deductions and proceeding to determine the tax home of state legislators on a case-by-case basis. See S. Rept. No. 938, 94th Cong., 2d Sess., 166 (1976). If a finding was made that the legislator's tax home was the state capital, deductions taken for living expenses incurred in connection with the time spent at the state capital were disallowed. This theoretically would have permitted the legislator to take a deduction for living expenses incurred in the district the state legislator represented. However, because taxpayers had relied upon prior practice, many were unable to substantiate the expenses incurred in their districts. Congress sought a way to provide consistency in the tax treatment received by state legislators.

"The location of a Federal legislator's tax home was first provided for in an amendment to section 23(a)(1)(A) of the Internal Revenue Code of 1939 [currently section 162(a)]. Under that amendment, the place of residence of the Member of Congress within the State, congressional district or possession which he represented was considered his home. Members of Congress were permitted to deduct amounts up to $3,000 expended for living expenses while away from that tax home.

"Section 604 was an attempt to put state legislators on an equal footing with Members of Congress. It is therefore important to examine the addition to section 162(a) originally made in 1952. Section 23(a)(1)(A) of the 1939 Internal Revenue Code permitted all taxpayers to deduct, from gross income, travel expenses incurred while away from home in the pursuit of a trade or business. However, this deduction was contingent on the definition of the term 'home.' The Tax Court had held that the home of a Member of Congress for tax purposes was the District of Columbia on the theory that this is the business location of the Members of Congress. Based upon this determination, the expenses of a Member of Congress while attending a session of Congress were not deductible.

"The amendment was designed to rectify this situation by providing that 'home' for the purpose of the deduction for travel expenses while away from home, shall be the home maintained in the district represented by the Member of Congress. This amendment was felt to be the best way to provide an equitable, uniform rule for all Members of Congress. By legislatively

determining their tax home, the amendment allowed them a deduction for the expense of meals and lodging while in Washington on official business on behalf of their constituents.

"When section 162(a) was amended to decide the issue of the tax home of Members of Congress, the only reason there was a need to settle that question was to enable Members of Congress to take deductions for travel away from that home.

"All deductions are a matter of legislative grace. A taxpayer seeking a deduction must be able to show that he comes within the express provisions of the statute. *New Colonial Ice Co. v. Helvering* [4 USTC ¶ 1292], 292 U.S. 435, 440 (1934).

"Section 162(a)(2) permits the deduction of 'traveling expenses * * * while away from home in the pursuit of a trade or business.' It is well settled that 'away from home' includes only overnight trips or trips on which a stop for sleep or rest is required. *United States v. Correll* [68–1 USTC ¶ 9101], 389 U.S. 299 (1967). The sleep or rest rule 'is particularly aimed at formulating an objective test which will obviate individual analysis of countless factual variations.' *Barry v. Commissioner* [71–1 USTC ¶ 91261], 435 F.2d 1290, 1291 (1st Cir. 1970), affg per curiam [Dec. 30, 154] 54 T.C. 1210 (1970). Furthermore, the sleep or rest rule requires a stop of sufficient duration that it would normally be related to a significant increase in expenses. *Barry v. Commissioner*, *supra* at 1291.

"After the enactment of the 1952 amendment, in order for a Member of Congress to qualify for a deduction under section 162(a) for living expenses while at Washington, D.C., it was still required that he comply with the requirement of being 'away from home." Away from home' expenses will always exclude commuting costs. It is settled law that commuting costs are treated as nondeductible personal expenses. Sections 1.262–1(b)(5) and 1.162–2(e), Income Tax Regs., *Fausner v. Commissioner* [73–2 USTC ¶ 9515], 413 U.S. 838, 839 (1973), rehearing denied 414 U.S. 882 (1973); *Commissioner v. Flowers* [46–1 USTC ¶ 9127], 326 U.S. 465 (1946); *Sullivan v. Commissioner* [Dec. 48], 1 B.T.A. 93(1924). Section 262 takes precedence over the provisions of section 162. *Sharon v. Commissioner* [Dec. 33, 890], 66 T.C. 515 (1976), affd. per curiam [78–2 USTC ¶ 9834] 591 F.2d 1273 (9th Cir. 1978), cert. denied—U.S.—(1979).

"The amendment added to section 162(a) in 1952 was not applicable to state legislators. In 1975, section 604 was referred to Congress in an attempt to provide (1) consistent treatment for state legislators with respect to the determination of their tax home and (2) to provide for a per diem amount deemed expended without substantiation during

periods when the legislators were away from that tax home.

"Although we have found no prior cases interpreting section 604 of the Tax Reform Act of 1976, the legislative history of section 604 indicates that the statute was intended to incorporate within it the requirement that the state legislators' expenses would be deductible only when the legislator was away from his tax home. See, H. Rept. No. 658, 94th Cong., 1st Sess., 178 (1975); 5. Rept. No. 938, 94th Cong., 2d Sess., 165 (1976); H. Rept. No. 1515, 94th Cong., 2d Sess., 60 (1976). This interpretation is also supported by the fact that section 604 was intended to provide treatment for state legislators that was similar to that provided to Members of Congress in the 1952 amendment to section 162(a).

"Therefore, applying section 604, on those days when petitioner traveled to Sacramento from his home at Cool (and later Roseville) and returned to his home at night, he was essentially commuting to and from his place of employment. Under the provisions of section 262, these expenses are not deductible. Because petitioner failed to be away from his home on those nights, he cannot be deemed to have expended the amount allowable as living expenses while away from home under section 604.

"On those days (60 days during 1973 and 27 days during 1974) when petitioner stayed in Sacramento, away from his tax home, he shall be deemed to have expended for living expenses while away from home the amount of per diem specified in section 604(a)(2)." (Fns. omitted.)

Thus, a review of the language quoted from the federal Tax Court reveals that the Tax Court interpreted the new federal tax provision, section 604, as implementing the basic federal tax provision, section 162(a)(2), which permits business expenses to be deducted only when the taxpayer is "away from home"

However, we were not construing either section 604 or section 162(a)(2) of the federal tax laws when we analyzed the issue presented in Opinion 78/6. We were construing a state statute, section 152, Statutes 1977, chapter 1079. With respect to that statute we stated in Opinion 78/6, 11. 79–32, that:

> "The section is quite clear. It provides that if a member of the state Legislature so elects for any taxable year prior to January 1, 1977, the place of residence of such a legislator within the legislative district which he represents shall be considered his home and that he shall be deemed to have expended for living expenses in connection with his trade or business the amounts he received as a per diem allowance under Government Code section 8902. The Legislature thus made a finding that the per diem allowance received under Government Code section 8902 was a traveling

expense deductible under Revenue and Taxation Code section 17202 as amended by Statutes 1977, chapter 1079. Such a determination, while not conclusive, is entitled to great weight and unless clearly erroneous will be upheld. (See *Solvang Muni. Imp. Dist. V. Jensen* (1952) 111 Cal. App. 2d 237, 240.)

"It should be noted that the Legislature also amended Revenue and Taxation Code section 17202 in Statutes 1977, chapter 1079. That section as amended will be applicable to tax years following December 31, 1976. In amending Revenue and Taxation Code section 17202 the Legislature did not provide that amounts received by a legislator under Government Code section 8902 would be deemed to have been expended for living expenses. The use of different language clearly indicates a different legislative intern. (*People v. Norwood* (1972) 26 Cal. App. 3d 148; *People v. Valentine* (1946) 28 Cal. 2d 121.) It is thus apparent that the Legislature intended that the living expenses paid pursuant to Government Code section 8902 would be treated differently in the years prior to 1977 than in the year subsequent thereto.

"Even if there were any conflict between the provisions of Revenue and Taxation Code section 17202 and Statutes 1977, chapter 1079, section 152, then the latter being more specific of the statutes would control. (See *In re M*. (1973) 9 Cal. 3d 517; *Kennedy v. City of Ukiah* (1977) 69 Cal. App. 3d 545.)

"Thus, any member of the legislature even though he commuted daily to the State Capitol from his district residence is entitled to exclude or deduct from taxable income the living allowances paid pursuant to Government Code section 8902 during any years prior to January 1, 1977."

Thus, we found that the California Legislature intended to achieve a different result than that which the Tax Court determined that Congress intended when the latter entity amended the federal tax laws. This conclusion is made very clear by reference to our further analysis in Opinion 78/6, I.L. 79–32, where we were construing the language of Revenue and Taxation Code section 17202 for the years subsequent to January 1, 1977, wherein we stated:

" . . . Revenue and Taxation Code section 17202 as amended is applicable to years subsequent to January 1, 1977, insofar as legislative income and expenses are concerned. Section 17202 is modeled after 26 United States Code 162.

"Since the Legislature in enacting Statutes 1977, chapter 1079, was attempting to conform California tax law to federal tax law, it must be presumed that the Legislature was aware of the manner in which the federal law had been interpreted by the courts. (See *Alter v. Michael* (1966) 64 Cal. 2d 480; *Reimel v.Alcoholic Beverage Appeals Bd.* (1967) 256 Cal. App. 2d 158.) In this regard, the federal courts have held that. unless a taxpayer is away from his home overnight that he is not entitled to deduct living expenses.

"Perhaps the leading case in this regard is *United States v. Correll* (1967) 389 U.S. 299. In the *Correll* case, the court upheld the ruling of the Commissioner of Internal Revenue that a taxpayer traveling on business may deduct the cost of the meals only if the trip requires him to stop for sleep or rest. This so-called 'overnight rule' would apply equally to Revenue and Taxation Code section 17202 as amended since the language of the federal statute and the state statute are the same. Thus, a legislator who commutes daily to Sacramento, after December 31, 1976, from his residence in the district which he represents would not be entitled to deduct living expenses since he does not remain away from home overnight. Thus, the living allowance paid pursuant to Government Code section 8902 would not be deductible by a legislator who commutes daily to Sacramento . . . ."

In the light of this analysis it is apparent that nothing said by the Tax Court in its decision in the *Chappie* case, interpreting federal law, suggests a different conclusion with respect to state law on the precise issue presented in this opinion.

Accordingly, upon reconsideration of the conclusion stated in Opinion 78/6, I.L. 79–32, we reach the same conclusion. Members and former members of the Legislature, with respect to state income taxes, may exclude or deduct from taxable income for the years prior to 1977 the living allowance paid to them pursuant to section 8902 of the Government Code, upon their making the election authorized by Statutes 1977, chapter 1079, section 152, irrespective of whether such a legislator commuted daily to the State Capitol from his district office so as to not be away from his district overnight.

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