The Home Office Deduction: Administrative Complexity versus Taxpayer Equity

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NOTES AND COMMENTS

THE HOME OFFICE DEDUCTION:
ADMINISTRATIVE COMPLEXITY VERSUS
TAXPAYER EQUITY

The employee home office expense deduction of today bears only a slight resemblance to its ancestor of a few years ago. Repeated litigation has modified and revised the nature of the deduction at such a rapid pace that even the Internal Revenue Service's attempted solidification of the home office deduction was destined to enjoy a relatively short life before suffering the erosive effects of litigation. In 1973, as a part of this ongoing process of refinement, the Tax Court in Stephen A. Bodzin and George W. Gino made dramatic changes in the standards used to allow the home office deduction. The changes have given birth to serious legislative concern which looms as a threat to the advances made by these cases. Barring any legislative action, however, the impact of these cases should be to herald an increased workload for the Internal Revenue Service in the name of taxpayer equity.

I. THE DEDUCTION

Under § 162(a) of the Internal Revenue Code of 1954 a taxpayer is permitted to deduct all the "ordinary and necessary" business expenses he incurs in carrying on his "trade or business." The expenses may not be personal in nature. However,
quite often expenses are incurred by the taxpayer that serve both substantial personal and business motives. In such instances the Code allows the taxpayer to allocate that portion of the total expenses that is attributable to business use to arrive at the proper deduction.

The home office expense deduction is an example of this legislative grace. Many employees use a portion of their homes to conduct a part of their work for their employers. If they are

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


12. Indeed, all "(d)eductions are a matter of grace and Congress can, of course, disallow them as it chooses." Comm'r v. Sullivan, 356 U.S. 27, 28 (1958).

13. Walter Cronkite does it behind closed doors. Grace Mirabella, the editor of Vogue, does it in a bedroom closet. Everett Fahy, the director of the Frick, does it under a seventeenth century printing of a madonna. And I'm doing it in the guest room as I write. Homework! Everybody's doing it. Part time. Overtime. Some time.


For a creative, if not radical, approach to the problems posed by the home office question as well as related problems involving § 162 and § 262 allocations see Halperin, Business Deductions for Personal Living Expenses: A Uniform Approach to an Unsolved Problem, 112 U. Pa. L. Rev. 859 (1974) [hereinafter cited as Uniform Approach]. Professor Halperin sets forth the thesis that if expenditures by an individual yield personal satisfaction or benefits, that degree of satisfaction or benefits should somehow be reflected by an increased gross income to the taxpayer. He expands on this notion and states:

An indirect way of taxing these benefits is to deny a deduction to the extent personal satisfaction has been obtained from the expenditure. If satisfaction were equal to cost, this approach would suggest complete disallowance.

Id. at 863.

Professor Halperin suggests four factors which should be considered in determining whether or not a particular expenditure can reasonably be expected to equal the derivative satisfaction from the expenditure:

1. The degree of certainty as to the business benefit to be obtained.
2. The degree of certainty as to the existence of personal enjoyment.
able to overcome some hurdles of proof, they are entitled to claim the expense of running that portion of the home as a deduction when computing taxable income. All the expenses attributable to the home office are allowed. These may include rent (for the taxpayer who rents his home), depreciation, mortgage interest, telephone, heat, electricity, insurance, cleaning and repairs. It is not necessary that the portion be exclusively used for business purposes. A taxpayer may qualify for the deduction even if the portion of the residence is also regularly used by the taxpayer and his family for personal pleasures. It is not necessary that the portion of the residence sought to be claimed as a home office be a well defined area. Indeed, taxpayers have successfully claimed

3. The possibility of both business and personal satisfaction from the same expenditure.
4. Payment of the individual benefitted or by another party.

Id. at 887 (footnote omitted).

15. See text accompanying notes 43-54 infra.
16. INT. REV. CODE OF 1954, §§ 63(a), 162(a).
20. Id.
27. Rev. Rul. 180, 1962-2 Cum. BULL. 53. Repair expenses are allocable to the home office on the basis of the expense's actual application to the home office. In addition, the taxpayer is allowed to include a pro rata portion of painting the outside of his house or repairing the roof. However, "[e]xpenditures for lawn care, landscaping, etc., are not deductible." Id. The employee is apparently discriminated against by such policy. For examples of other ways in which employees are discriminated against under our tax system see 47 INDIANA L.J. 546 (1971).
28. See text accompanying notes 113-39 infra for a discussion of exclusivity of business use of the home office. See also notes 159, 163 infra.
29. However, he must be able to show that the business use of the office is "regular" as well. See text accompanying notes 67-75 infra. Furthermore, the taxpayer in this situation will be faced with the task of computing a home office expense that somehow reflects the business use of the home office as a percentage of the total use of the home office. This problem is discussed in the text accompanying notes 113-39 infra.
30. The courts have treated most favorably those taxpayers whose claimed home
parts of rooms, garages, basements, alcoves and even a dining room table as constituting home offices. The deduction is indiscriminately granted to employees who work in such fields as law, accounting, education, and governmental service as well as to those who pursue more exotic professions such as gamblers, inventors and entertainers.

II. THE TAXPAYER'S BURDEN OF PROOF

The taxpayer has the burden of meeting three requirements in order to qualify for the home office deduction. First, he must establish that the portion claimed as an office was actually used in carrying on a "trade or business." Second, he must prove that the home office was "regularly" used in pursuit of business activities. Third, he must establish that the maintenance of the home office was "appropriate and helpful" to his business. A failure to meet any one of these standards could result in a total disallowance of the deduction.

offices are well defined areas, however. This probably owes to the taxpayer's burden of substantiation and the Cohan hurdle discussed in the text accompanying notes 49-54 infra, and not the merit of the claimed deduction.

38. 60 T.C. 304 (1973), appeal docketed, No. 74-1484, 9th Cir., Mar. 21, 1974.
42. Madge H. Evans, 8 P-H B.T.A. Mem. 164 (1939).
43. Tax Ct. R. Prac. 32.
The burden of proof rests upon the taxpayer to establish (1) that, as a condition of his employment, he is required to provide his own space and facilities for performance of some of his duties, (2) that he regularly uses a part of his personal residence for that purpose, (3) the portion of his personal residence which is so used, (4) the extent of such use, and (5) the pro rata portion of the depreciation and expenses for maintaining his residence which is properly attributable to such use.
47. See text accompanying notes 76-103 infra.
If the taxpayer has met these requirements he will be entitled to a deduction for the expenses of running the home office. However, the deduction that will be allowed by the Internal Revenue Service will probably be less than the deduction claimed by the taxpayer unless a further standard of substantiation is met. The Cohan rule allows the taxpayer a deduction for expenses where it is obvious that deductible expenses have been incurred but are not substantiated. But it also dictates that since the amount of the claimed expense in such a case is only an approximation of the true expense, that approximation may "... bear heavily upon the taxpayer whose inexactitude is of his own making." It is therefore advisable that the taxpayer be able to provide proper and adequate documentation of his expenses so that he will qualify for the full deduction allowable.

A. Trade or Business

Although the use of the term "trade or business" pervades the Code, it is never defined. Consequently, the task of definition has belonged to the courts. Its meaning in the context of §

49. Cohan v. Comm'r, 39 F.2d 540 (2d Cir. 1930).
50. Judge Learned Hand, speaking for the majority, said "to allow nothing at all appears to us inconsistent with saying something was spent." Id. at 544.
51. Id. at 543.
52. Id. at 543-44.
53. See Treas. Reg. §§ 1.162-17(d)(2), (3)(1959). Although these sections focus on the degree of substantiation required for an employee who must prove expense account expenditures, the types of things suggested to taxpayers are applicable to the home office area as well. An accurate record of bills paid and supporting documentary proof will prove invaluable to the taxpayer claiming the home office deduction. See Crumbly, Courts Are Changing Current Tax Climate on Office At Home Deduction, 31 J. Tax. 300 (1969) [hereinafter cited as Crumbly].
56. See Berswanger, Factors Used By the Courts to Determine What is a Trade or Business for Tax Purposes, 4 Taxation For Accountants 178 (1969).
57. However, when the home office expense is claimed by a self-employed individual rather than an employee, the question of whether a legitimate § 162 expense has been incurred can be troublesome. For instance, if the self-employed taxpayer claims as business expenses activities which are generally considered to be personal in nature, these expenses may be disallowed unless the taxpayer can clearly show that the expense served business purposes. Louis Greenspon, 23 T.C. 138 (1954), aff'd, 229 F.2d 947 (8th Cir. 1956);
may only be gleaned by reference to the apposite case law and its application to the given factual situation.

In the home office area, it is relatively easy to gauge whether or not the trade or business requirement has been met. Rarely is the business nature of the claimed deduction an issue. It is sufficient that the employee-taxpayer does work at home. The employee is considered to be in the "business" of being an employee or of earning his pay. Thus, any work done by an employee reasonably related to his work as an employee falls within the trade or business concept of § 162. Naturally, the expenses claimed as business expenses must indeed be related to his work and must not primarily further personal goals. The link must be strong between the activity claimed to be part of the employee's work and the employee's duties.

The taxpayer, although satisfying the above requirements, might not meet the trade or business requirement if he had a right of reimbursement against his employer which he failed to exercise or if the employer would have originally paid the expense as his own, had the employee so requested. The rationale behind this is, clearly, that in these instances the expenses are considered to be the obligations of the employer. To allow the employee a

cf. Cohan v. Comm'r, 39 F.2d 540 (2d Cir. 1930); see also C. Harry Blunt, 25 CCH Tax Ct Mem. 1445 (1966); Russell McCaulley, 33 P-H Tax Ct Mem. 12 (1964). An activity must clearly look more like a business than a hobby for a taxpayer to qualify for the deduction. Mayrath v. Comm'r, 357 F.2d 209 (5th Cir. 1966), aff'd 41 T.C. 582 (1964); cf. Richard L. Malter, 26 CCH Tax Ct Mem. 459 (1967). Additionally, the taxpayer must establish that the activities engaged in were contemplated to show an eventual profit (William Tiffin Downs, 49 T.C. 533 (1968)) and were not merely preparatory to engaging in a trade or business (Eugene A. Carter, 51 T.C. 932 (1969)). This expectation must be realistic. William Tiffin Downs, supra.

62. See, e.g., Stanley T. Yascolt, 30 CCH Tax Ct Mem. 55 (1971) (petitioner's claim that he used his residence for the business purpose of entertaining customers and therefore was entitled to a rental expense deduction was disallowed because he could not establish that the entertaining was part of his business as is required by § 274(a)(1)(B) of the Code and Treas. Reg. § 1.274-2(e)(4)(iii) (1964).
64. Noland v. Comm'r, 269 F.2d 108 (4th Cir. 1959); Heidt v. Comm'r, 274 F.2d 25 (7th Cir. 1959).
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deduction for paying the expenses of another would be anomalous.66

B. Regular Use

The requirement that the use of the home office must be “regular” is vague. Nowhere in the Code or the Income Tax Regulations is there an explicit definition of “regular.”67 Only through an examination of what is not considered to be “regular” may an understanding of the word be molded.

The Internal Revenue Service in Revenue Ruling 62-180 gives an example of the type of use of part of one’s home that would fail as a home office because the work carried on therein was not “regular”:68

Occasionally, [the employee] is unable to complete [his required work] by the close of business and finds it necessary to work on it after hours. Since the corporation’s offices are closed to employees after six o’clock, he takes [his required work] home and works on it at a desk in his den.

Since the business use of the den is incidental and occasional rather than regular, the expenses of maintaining his residence which are allocable to the occasional use of the den for business purposes are, therefore, not ordinary and necessary business expenses and are not deductible.

Unfortunately, the example given as an attempt to define regular is of little help, since “occasional” is defined circularly. Clarification of the “incidental” concept is never even approached in the ruling.

The taxpayer need not be a clairvoyant, however, to deter-

66. See Dodd v. Comm’r, 298 F.2d 570, 578 (4th Cir. 1962); Deputy v. du Pont, 308 U.S. 488 (1940). See also Brown v. Comm’r, 446 F.2d 926 (8th Cir. 1971).

67. Rev. Rul. 180, 1962-2 CUM. BULL. 52-57. The “regular” requirement is the only one of the three existing requirements that has no basis in § 162 of the Code. Proposed legislation would remedy this. See note 159 infra at § 280(c)(1).

68. The “regular” concept is probably an extension of the requirement that expenses must fall closer to the dictates of § 162 of the Code than to § 262 to be deductible. See Staller, supra note 14.

mine whether the work in the home office is "regular" enough to qualify him for the deduction.70 The case law has established some guides for the taxpayer to follow that appear to be concrete. The taxpayer must be able to show that his use of the office is ongoing and of a continuous nature.71 Evidence that tends to show that the employee has abandoned working at home may result in a denial of the deduction.72 The "regular" requirement, however, seems to be in question very seldom; the threshold that must be passed is low.73 The taxpayer will apparently qualify for the deduction if the home office is used at least two hours per week-night,74 or ten hours per week.75

C. Appropriate and Helpful

The third requirement, that the home office be "appropriate and helpful" in carrying on the taxpayer's trade or business, is the most interesting one. Its recent emergence as a liberal interpretation of the Code's "ordinary and necessary" requirement in the home office deduction area has been slow, indicating a cautious reluctance by the courts to accept it as the proper construction of "ordinary and necessary." The adoption in Stephen A.

70. Presumably, the taxpayer should qualify for the deduction regardless of regularity of use, however the term "regular" is ultimately defined. See note 67 supra and the discussion of the Cohan rule in the text accompanying notes 49-54 supra.
73. The courts have allowed a home office deduction even where the taxpayer was able to show "a minimal use of his home for business purposes." Lyndol L. Young, 26 P-H Tax Ct. Mem. 856 (1957), aff'd, 268 F.2d 245 (9th Cir. 1959). Apparently, a home office deduction will be allowed if the expense is slightly less than five percent of the total expenses of the home. Stephen A. Bodzin, 60 T.C. 820 (1973) ($100 of $2100 in rental expenses was claimed and allowed as a deduction). But see dissenting opinion of Judge Featherston in Bodzin, id. at 827-28.
75. Hoggard v. United States, 20 Am. Fed. Tax. R.2d 5805 (B.D. Va. 1967). It is possible that with the adoption of a very low "appropriate and helpful" standard (see text accompanying notes 92-103 infra) the requirement of "regular" use may fall by the wayside; a determination that the home office was "appropriate and helpful" would seem to render a finding that the work was not "regular" meaningless.
76. An earlier case, Marvin L. Dietrich, 30 CCH Tax Ct. Mem. 685 (1971), echoed Welch v. Helvering, 290 U.S. 111, 113 (1933), and held that in the home office area, the Code's "ordinary and necessary" requirement would be met if the office was "appropriate and helpful" to the taxpayer's business. The case was, however, of little value in setting a standard as the term "appropriate and helpful" was not well defined but was merely used by the court in its decision. It may be implied from the facts of Dietrich that the court used "appropriate and helpful" in the same way an earlier court used "appropriate." See the discussion of the Bischoff case in the text accompanying notes 79-81 infra.

Welch v. Helvering, defined "ordinary" to mean that the claimed deduction be an
Bodzin of an extremely low "appropriate and helpful" standard effectively vitiated the portion of Revenue Ruling 62-180 which states:

[a]n employee who, as a condition of his employment is required to provide his own space and facilities for performance of his duties . . . may deduct a pro rata portion of the expenses of maintenance and depreciation on his residence.

The process of vitiation that ended with Bodzin, began in Herman E. Bischoff. The taxpayer, Bischoff, was a commercial artist who worked overtime in a home office even though his regular studio was available to him after hours. Although the establishment of a home office was not a condition of Bischoff’s employment, his employer expected him to establish one. The court allowed the home office deduction on the grounds that “it was appropriate to the conduct of his trade of business.” Yet the holding of Bischoff disturbed Revenue Ruling 62-180 only slightly because of the unique circumstances of the case. The establishment of Bischoff’s home office was “appropriate” because the temperature of his regular office after normal hours made it very undesirable for him to work there overtime. Thus, the Bischoff court’s adoption of the “appropriate” criterion was not a significant departure from the Code’s “ordinary and necessary” language. Bischoff’s home office was “appropriate” because in that case it was “necessary” for him to establish a home office in order to complete the work expected of him. Nevertheless, Bischoff did erode a portion of the ruling by examining the “condition of employment” requirement from the standpoint of it being “appropriate.”

The next case to pick up the “condition of employment” expense that is consistent with normal business practices and is non-capital. A later case, Comm’r v. Tellier, 383 U.S 687 (1966) narrowed the “ordinary” concept to only include all expenses which are non-capital. Indeed, in the home office area taxpayers have unsuccessfully negotiated the “ordinary” hurdle because the expense claimed as a deduction was capital. See, e.g., Wilbur F. Bolin, 26 CCH Tax Ct. Mem. 62 (1967). In the overwhelming number of home office cases, however, the problem does not center around the expense’s capital or non-capital nature but rather centers around whether the expense was “necessary.” The “appropriate and helpful” standard is, thus, more properly viewed as a descendent of the “necessary” requirement than the “ordinary” dictate of the Code.

77. 60 T.C. 820 (1973), appeal docketed, No. 74-1397, 4th Cir., Apr. 4, 1974.
80. Id. at 539.
81. The petitioner claimed that after 6 P.M. the air conditioning and heating systems functioned inefficiently making it very unpleasant to work overtime at the office.
question was Newi v. Commissioner. The taxpayer, Newi, was in the business of selling television time. He worked at home during the evenings by watching television. His employer did not require him to establish a home office. His claimed home office deduction was, however, allowed. Although Judge Moore, speaking for the Second Circuit, did not say that his decision rested upon the grounds that the home office was “appropriate and helpful” to Newi’s business, the decision is best understood if viewed in that light. Presumably, Newi’s three to six hours per night of television viewing made him a more effective salesman; the work done in the home office helped his business. The Newi court flatly rejected the “condition of employment” dictate of Revenue Ruling 62-180 by allowing a home office deduction that proved to be “appropriate and helpful” to the taxpayer in his trade or business but was not required as a condition of his employment.

Newi is important for another reason. Since Newi’s regular office was available to him at all times, the establishment of a home office apparently served a personal motive of convenience to some degree. Although the court did not deal directly with the issue of convenience, the facts of the case illustrate that the

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83. The court allowed the deduction, saying “[i]t would be hard to imagine a better method than, in the isolation of his study-den, to view, ponder over and make notes relating to television programs.” 432 F.2d 998, 1000 (2d Cir. 1970) (dictum). The Tax Court did, however, use the “appropriate and helpful” language. 28 CCH Tax Ct. Mem. 686, 691 (1969).
84. This result was based upon the court’s application of Tellier to the home office context. Since Tellier redefined “ordinary” to mean non-capital, thus eliminating the focus on the business practices of the taxpayer’s employer, the sole criterion for deductibility after Tellier is the “appropriateness and helpfulness” of the expense to the taxpaying employee. 47 INDIANA L.J. 546, 665 (1971) (footnotes omitted). See note 76 supra.
85. It is possible that the Newi court might have been lax in its failure to squarely face the convenience issue, as such a consideration is apparently mandated by Revenue Ruling 62-180. Yet, the court did consider the convenience issue to some degree. Judge Moore, for the majority, reasoned that it would have been “wholly impractical” for Newi to have gone back to the office after dinner at home because he would have had to hail a cab at theater hour and travel against untimed traffic lights, through hectic traffic to his office, possibly missing important TV shows in the process. 432 F.2d 998, 1000 (2d Cir. 1970). Presumably, Newi had the option of using a faster means of transportation than a taxi-cab back to his office, such as a subway; he might also have eaten dinner at his office if he had so chosen and not returned home until later in the evening. He chose to do neither. Thus, it may be concluded that the home office was established because it was more convenient for Newi to do his work there than at his regular office. Considering the pains the court took to discuss the woes of the intra-city commuter, it is difficult to come
mere existence of convenience as a motive in establishing a home office does not invalidate the deduction. The Newi court recognized, albeit implicitly, that convenience should be only one area of focus in determining whether a home office is helpful and not simply a factor that will serve automatically to deny the deduction.

Unlike the situation in Bischoff, it is clear that the taxpayer’s home office work in Newi was voluntary. Arguably, a finding that the home office work is “appropriate and helpful” moots the question of whether the deduction should be allowed if it is voluntary. Yet the Commissioner was concerned that Newi “opens the door for a business deduction to any employee who would voluntarily engage in an activity which conceivably is helpful to his employer’s business.” The Commissioner not only had trouble accepting the idea that Newi’s evening work was “appropriate and helpful” to his business but was obviously concerned that even if it was “appropriate and helpful,” the deduction should not be allowed because the work was of a voluntary nature.

He feared that many more people than had previously claimed the deduction would now be able to do so. It was to be but a relatively short time before the Commission reached the conclusion the the Newi court did not consider the convenience issue at all, although it allowed the deduction on the fact that the commuting might have caused the taxpayer to do his job less efficiently by missing some TV shows.


87. 47 INDIANA L.J. 546, 547 (1971).

88. Earlier courts were disturbed by the concept of voluntary work and disallowed the deduction where it was found that the home office work was voluntary. See, e.g., Harold H. Davis, 38 T.C. 175 (1962), vacated by stipulation and remanded, No. 18188, 9th Cir., Jan. 3, 1964. Others seemed uncomfortable with even approaching the concept and shied away from examining the “voluntary” issue. See Demor, Inc., 27 CCH Tax Ct. Mem. 1496 (1968). Arguably the “voluntary” question as well as the convenience issue is centered around the “appropriate” portion of the “appropriate and helpful” construction of “necessary.” See note 76 supra. However, a court has yet to handle the “voluntary” or “convenience” points in such fashion.

89. Brief for Respondent (Commissioner) at 11-12, Newi v. Comm’r, 432 F.2d 998 (2d Cir. 1970). The court did little to quell the Commissioner’s fears, remarking whimsically that Newi only “opens the door just long enough to enable this Taxpayer to pass through it into his cloistered study to pursue his business.” Id. at 1000.


91. The Commissioner’s fears could have been based upon the notion that voluntary use might lead to a wasteful duplication of facilities, but no such rationale was proposed. This “duplication of facilities” argument was unsuccessfully made a bit later in LeRoy W. Gillis, 32 CCH Tax Ct. Mem. 429 (1973).
sioner’s fear would be realized. In *Stephen A. Bodzin*\(^{22}\) a home office deduction was allowed where the taxpayer, an Internal Revenue Service attorney, voluntarily maintained a home office where he did legal reading to keep his knowledge of the tax laws current.\(^{93}\) The “petitioner was not required, requested, expected or encouraged to work after normal working hours.”\(^{94}\) The office was voluntarily maintained by the taxpayer because it helped him to execute more effectively his duties as a tax lawyer working for the government.\(^{95}\) Bodzin found it “desirable” to do his overtime work and in fact “... liked to use evenings and weekends

\(^{92}\) 60 T.C. 820 (1973), appeal docketed, No. 74-1397, 4th Cir., Apr. 4, 1974.

\(^{93}\) It was allowed, but not without three vigorous dissents. Judge Scott (Drennan & Featherston, J., concurring) argued against Bodzin’s claimed deduction on the grounds that most anyone who was interested in their work and did reading in the home as a result of this interest would now qualify for the deduction. 60 T.C. 820, 827 (1973).

Judge Featherston (Drennan, J., concurring) argued that Bodzin’s deduction should be disallowed for two reasons. First, he did not feel that the petitioner incurred any expenses in carrying on a trade or business. Rejecting the majority opinion, he wrote: [It] is beside the point that petitioner’s overtime work or his use of his home office was appropriate and helpful to the performance of his duties as an attorney for the Internal Revenue Service. That is not the issue. The question is whether the rental expenses were paid or incurred in carrying on petitioner’s business. And there is nothing to show that he would not have incurred these same rental expenses (or that his rent would have been less) if he had found it more convenient to do his overtime work at the office provided and maintained for that purpose by his employer.

60 T.C. 820, 827 (1973). This first reason does not ring true; actual use of the facility apparently is the determinative criterion. George W. Gino, 60 T.C. 304 (1973), appeal docketed, No. 74-1484, 9th Cir., Mar. 21, 1974; International Artists, Inc., 55 T.C. 94 (1970); accord, Treas. Reg. § 1.274-2(e)(4)(1963). Judge Featherston’s second reason for opposing the deduction was that Bodzin’s use of the home office was incidental to his business. However, there is authority to support a finding that Bodzin did meet the regular requirement. See Hoggard v. United States, 20 Am. Fed. Tax. R.2d 5805 (E.D. Va. 1967) (petitioner worked at home about 10 to 15 hours per week). See text accompanying notes 67-75 supra.

Judge Quealy (Drennan, J., concurring) could not accept Bodzin’s deduction as constituting an “ordinary and necessary” business expense. Stating what conceivably could be construed as a new test that taxpayers desiring to claim the home office deduction should meet, he commented:

... I would require as a minimum proof on the part of the taxpayer that the space claimed to have been devoted to this purpose in the residence of the taxpayer would not have been acquired except for such purposes.

60 T.C. 820, 829 (1973) (emphasis in original).

\(^{94}\) Id. at 822.

\(^{95}\) The “voluntary” issue was handled in a most curious manner in *Bodzin*. The Commissioner made the argument that the expense incurred in maintaining a home office was actually an expense of Bodzin’s employer which he voluntarily assumed and therefore was not deductible by Bodzin. The court rejected this argument, saying “that petitioner had no right to reimbursement for such expenses and, consequently, he did not voluntarily assume them.” Id. But cf. note 63 supra and accompanying text.
to read widely about current developments in the tax law.\textsuperscript{96}

\textit{Bodzin} clearly marks an even greater relaxation of the “ordinary and necessary” requirement than did \textit{Newi}. A home office deduction may now be allowed where the home office’s establishment is possibly only a reflection of the taxpayer’s interest in his work. The door the Commissioner feared had been opened by \textit{Newi} was ripped from its hinges by \textit{Bodzin}. Thus, the “ordinary and necessary” requirement of the Code is now interpreted to establish a very low “appropriate and helpful” threshold for the taxpayer seeking the home office deduction.

Apparently, the only time the taxpayer will be denied the deduction when the “appropriate and helpful” standard (and naturally the trade or business and regular use requirements) has been met is in those instances where convenience is the predominant motive in establishing the home office.\textsuperscript{97} Yet \textit{Bodzin} fails to explain how the convenience restriction is to be gauged. While the \textit{Newi} court implicitly recognized that convenience is often times an element in determining what is “appropriate and helpful,” the \textit{Bodzin} decision contemplates that convenience is an issue that must withstand analysis on its own. The \textit{Bodzin} court said:\textsuperscript{98}

\begin{quote}
[a] finding that the home office was simply for the taxpayer’s personal convenience would bar the deduction if the Court concluded that personal convenience was the primary reason for maintaining the office.
\end{quote}

The restriction of convenience presumably operates to prevent a wasteful duplication of facilities.\textsuperscript{99} Yet, in most cases a duplication in the home office deduction area is not wasteful but, to the contrary, increases the taxpayer’s efficiency. For instance, the establishment of a home office reduces commutation time in the cases where a person might ordinarily go home for dinner and then return to his regular office in the evening.\textsuperscript{100} A home office

\begin{footnotes}
\textsuperscript{96} 60 T.C. 820, 822 (1973) (emphasis added).
\textsuperscript{97} The court also pointed out that the home office deduction will be disallowed if it is found that the taxpayer “sought only to manufacture a deduction.” \textit{Id.} at 826. What the court meant by this is not clear. If it intended by the statement to disallow all home office deductions where there in fact was no home office, one wonders why it bothered to state the obvious. If, however, it intended by its statement to disallow the deduction upon a finding that the taxpayer’s sole reason for establishment of the home office was simply to get a deduction, has the court in effect pronounced a new requirement that the taxpayer must pass?
\textsuperscript{98} \textit{Id.} at 826.
\textsuperscript{99} See note 91 supra.
\textsuperscript{100} See note 85 supra.
\end{footnotes}
might also provide a more relaxed atmosphere or pleasant environment that is more conducive to work than the regular office after hours. Thus, a home office, except in the case where the taxpayer's home is very close to the regular office, should rarely be subject to the convenience restriction. In the majority of cases, convenience is most properly viewed as simply a factor determining the efficiency of a taxpayer's work in the home office rather than the reason for the establishment of the home office in the first place.

III. ALLOCATION OF EXPENSES TO THE HOME OFFICE

To arrive at the amount of expenses that are fairly attributable to the business portion of the home, the taxpayer should calculate a space formula that represents the size of the home office as a percentage of the entire home. Revenue Ruling 62-180 contemplates that any "reasonable" method of allocation may be used. One such reasonable method is to compare the

101. The efficiency that will be gained may extend to areas other than the home office. For example, in Bodzin, the taxpayer was able to make better use of his car pool because of the establishment of a home office. 60 T.C. 820, 823 (1973).

102. To the chagrin of former President Richard Nixon, a claimed home office deduction that he took with regard to the "San Clemente White House" was disallowed by the Joint Committee on Internal Revenue Taxation when his personal federal income tax returns came under public scrutiny. The convenience restriction was apparently the stumbling block to the deduction's validity in this case.

Beginning in 1969, the Government built an office building complex (costing $1.7 million) which is situated on government property within 300 yards of the San Clemente residence. This is commonly referred to as the "Western White House." The President has a personal office in that building and conference rooms are available for staff meetings. Golf carts were purchased by the Government to transport the President and members of his staff to and from the office complex.

Nixon's Taxes, supra note 39, at 131.

In view of the proximity of the office complex furnished by the Government to the President's residence, the staff believes that the home office was maintained primarily for the personal convenience of the President. Thus, the staff believes that use of the President's home as an additional office is not "appropriate and helpful" under the court's standards, but merely duplicates the facilities provided by the Government and, therefore, is maintained by him primarily for his personal convenience.

Id. at 138.

103. See notes 83, 87 supra.

104. Under the Committee Proposal, supra note 6, allocation would become significantly more complex than it is at the present. See note 159 infra at § 280(f).


106. Rev. Rul. 180, 1962-2 Cum. Bull. 52, 54. However, some rather strange methods have been used by taxpayers. See, e.g., Walter W. Hendrix, 30 CCH Tax Ct. Mem. 221 (1971). The taxpayer in Hendrix maintained a home office in his basement. The basement had dimensions no larger than thirteen by eighteen feet. The outside dimensions of the
number of rooms in the home devoted to business purposes with the total amount of rooms in the home to arrive at the percentage to be applied to all the expenses. 107 Another method commonly used derives the percentage by a comparison of the square footage in the home used for business purposes and the total square footage of the home. 108

Often a home office consists of undefined work areas scattered throughout the home. 109 In such cases it would be most difficult to compute a space percentage as described above. The courts allow the taxpayer to approximate the amount of the home that is devoted to business use in these instances. 110 Some have even gone so far as to allow a home office deduction where the taxpayer offers no proof as to the extent of the home office. 111 This is not a very wise practice for the taxpayer to follow, however, as case law bears out the point that the less specific a taxpayer’s method of allocation, the more likely the court is to invoke Cohan and make its own, probably less generous, approximation. 112

Revenue Ruling 62-180 recognizes that a home office may exist only part of the time for a taxpayer. That is, the portion of

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109. See, e.g., George W. Gino, 60 T.C. 304 (1973), appeal docketed, No. 74-1484, 9th Cir., Mar. 21, 1974 (petitioner’s work spaces included the dining room and kitchen tables).

110. Id.

111. See Stanley E. Bailey, 30 CCH Tax Ct. Mem. 460 (1971) (court allowed deduction as “reasonable in amount”) and Walker B. Hough, 21 CCH Tax Ct. Mem. 370 (1962) (deduction allowed upon court’s finding that residence was to some extent used for business activities); cf. Cohen v. Comm’r, 39 F.2d 540 (2d Cir. 1930). But see Louis Greenspon, 23 T.C. 138 (1954), aff’d, 229 F.2d 947 (8th Cir. 1956) (“[T]he deduction of any expenses normally considered personal should not be allowed without clear and distinct evidence that the expenses were for business purposes.” 23 T.C. 138, 151 (1954)).

112. See text accompanying notes 49-54 supra. Indeed, it is possible that the deduction might be disallowed in its entirety in defiance of Cohan. See Raymond Schott, 23 CCH Tax Ct. Mem. 1648 (1964).
the home used for business purposes may be used for personal activities when not used for business.\(^{113}\) In such instances, the ruling dictates that the space formula derived to allocate to the business portion of the home a fair share of the entire home's expenses must be further modified to include a time dimension.\(^{114}\) The resultant space-time formula that is to be applied to the total amount of home expenses in order to arrive at the taxpayer's allowable deduction is a logical extension of the concept that permits a taxpayer to allocate expenses wherever a facility serves both business and non-business motives.\(^{115}\)

The space-time formula is a well accepted method of allocation used by the courts.\(^{116}\) Wherever there is no exclusivity of business use of a portion of a taxpayer's home, a space-time formula must come into play or else injustice will occur. If, for instance, the taxpayer works in his bedroom for only two hours per night, the application of a sterile space formula might allow a full deduction for a portion of the home which serves a substantially personal motive. Conversely, a formula that fails to account for the time an office is used might deny a taxpayer a deduction altogether upon a finding that the portion in question is essentially personal in nature.

Although the space-time formula is currently used in appropriate situations, the time dimension of the formula has not been well defined.\(^{117}\) This has caused inconsistent case results blocking the establishment of a reliable guide that may be used by the taxpayer. Some of the earlier cases that used the space-time formula employed a rather simplistic analysis to derive the time dimension of the formula. For example, in Charles R. Goddard,\(^{118}\) a rough approximation of the amount of time the office was used on business matters was made. Thus, a finding that 25 percent of the space in the home was used for 50 percent of the time resulted in a space-time formula of 12 1/2 percent.\(^{119}\) An examina-
tion of how the time dimension was calculated was not presented. The Goddard court contemplated that the 50 percent figure was indicative of the home office that was used as much for personal motives as it was for business motives. Yet, the Goddard court, in stating that the 50 percent figure represents equal business and personal use, merely begged the question of what the 50 percent figure was based upon.

Revenue Ruling 62-180 states that the time dimension of the space-time formula should be calculated by deriving a ratio that compares the time the home office is used for business purposes with the total time it is available for all uses.\textsuperscript{120} The first case to apply this formula was Martha E. Henderson.\textsuperscript{121} In that case, the petitioner used 50 percent of her apartment to conduct her business activities, which consumed approximately 40 hours per week. The time dimension of petitioner's formula was therefore 24 percent.\textsuperscript{122}

Henderson illustrates a problem with modifying the space formula with a time dimension in the case where the home office is not used exclusively for business purposes. The businessman whose business premises are not part of his home is allowed to deduct the full amount of the expenses incurred in running those premises. On the other hand, the employee who is not provided with regular office space and is thereby forced to use a portion of his home as an office, must incorporate a time dimension into the allocation formula when the business use of a portion of the home is not exclusive. In most instances it seems fair to require him to do so.\textsuperscript{123} But in cases such as Henderson, where the taxpayer uses his home office for 40 hours—the time generally considered to be a full work week—the application of a time dimension to the allocation formula as is required by Revenue Ruling 62-180 arguably results in unjust discrimination. The employee, although devoting as much time to his business as does the larger businessman, is penalized by the time dimension requirement because he is an employee.\textsuperscript{124}

When the taxpayer does the equivalent of a full

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{120} Rev. Rul. 180, 1962-2 CUM. BULL. 52, 54, 56.
\item\textsuperscript{121} 27 CCH Tax Ct. Mem. 109 (1968).
\item\textsuperscript{122} The court arrived at the 24 percent figure by dividing the hours worked in the home office (40) by the number of hours in a week (7 x 24 = 168).
\item\textsuperscript{123} The general theory of allocation between personal and business use demands allocation wherever both substantial business and personal motives exist. See text accompanying notes 7-11 supra.
\item\textsuperscript{124} See Wolfman, Professors and the "Ordinary and Necessary" Business Expense, 112 U. PA. L. REV. 1089 (1964), wherein Dean Wolfman, in commenting upon the Service's initial denial of a college professor's claimed research expenditure deduction (Harold H.
\end{enumerate}
\end{footnotesize}
week's work in a home office, the notion of watering down the space formula with a time adjustment seems unfair.\footnote{125}

The first case to deal with the question of what should be the proper time dimension where a time dimension was a necessary element of the allocation formula was \textit{International Artists, Ltd.}\footnote{126} The home office in that case was used about 20 percent of the days in the year. The Commissioner, following \textit{Revenue Ruling 62-180} and \textit{Henderson}, determined that 20 percent was the applicable time dimension to be used in deriving the space-time allocation formula. The figure was arrived at by comparing the days of business use of the home to the days the home was available for all uses. The court did not accept the Commissioner's position that the time dimension should be calculated on the basis of the office's \textit{availability} for use and instead held that it should be decided on the basis of its \textit{actual} use.\footnote{127} The court allowed the petitioner a more generous home office expense deduction than the Commissioner had allowed based upon that reasoning.\footnote{128}

\begin{itemize}
  \item Davis, 38 T.C. 175 (1962), \textit{vacated by stipulation and remanded}, No. 18188, 9th Cir., Jan. 3, 1964), stated: \[\text{(the patent discrimination between the self-employed and the employed was ignored. Although a self-employed individual was ordinarily trusted to judge what was helpful and appropriate to his business, and his discretionary, business related expenses were deductible, the only safeguard deemed sufficient to the protection of the public fisc in the case of an employed person was the compelling mandate of his employer.}\]
  \item See also \textit{Crumbly}, supra note 53; \textit{47 Indiana L.J.} 546, 548-50 (1971); note 156 infra.
  \item A problem arises here with respect to fixing a full week's work cut-off point above which a time dimension is not used and below which one is used. A taxpayer falling below the cut-off point by only one hour or so is subject to the full time dimension restriction, whereas the taxpayer who uses his home office only one hour more need only apply the greater deduction generating space formula. Of course, some sort of sliding time dimension factor that would decrease as the use of the home office increased might be developed to solve this problem.
  \item In any event, this entire problem might be sidestepped by the application of the "total use" concept discussed and refined in \textit{International} and \textit{Gino}. See notes 126-39 infra and accompanying text.
  \item 55 T.C. 94 (1970).
  \item The court did not break new ground with the "actual use" test. See Treas. Reg. \textsection 1.274-2(e)(4)(1963), which is addressed to the problem of determination of an entertainment facility's primary purpose and states that "... it is the actual use of the facility which establishes the deductibility of expenditures with respect to the facility, not its availability for use ... ."
  \item The Commissioner allowed a space-time formula of $\frac{1}{6} \times 20$ percent or $\frac{1}{30}$. \textit{International Artists, Ltd.}, 55 T.C. 94, 106 (1970). The court allowed a 50 percent deduction. \textit{Id.} at 107.
\end{itemize}
Yet the International court, while rejecting part of Revenue Ruling 62-180 and setting up an actual use standard, avoided the question of what it meant by the term “actual use.” The 50 percent figure the court found to be based upon petitioner’s actual use of the home is of negligible precedential value as the method of calculation of that time dimension was not described in the International opinion. The International court did not deal with the question of how to compute a time dimension. It did not define “actual use.”

The Tax Court finally came to grips with interpreting actual use in George W. Gino. The petitioners were school teachers who used scattered portions of their various residences “a couple of hours a night” to prepare for class. The Commissioner’s contention that the time dimension should be calculated by comparing the hours of business use to the hours available for all uses was rejected. The court held that “the proper ratio to apply is the ratio of business use to hours of total use . . . .” The Gino court used the term “total use” in the same way the International court used “actual use”—that is, to reduce the sphere of reference from the time a facility is available for all uses to the more limited sphere defined by the time the facility is being taken advantage of and not just simply held or potentially usable.

Unlike the court in International, the Gino court attempted to specifically define the notion of total use. As its counterpart in International did, the Gino court rejected the portion of Revenue Ruling 62-180 calling for an allocation ratio based upon the home office’s availability for all uses. The Gino court defined total use as eight hours per day for the petitioners. That figure was arrived at by taking the total amount of the time spent in the apartment by the petitioners (sixteen hours per day) and

129. The court said simply “that the dual use of [the home] for business and non-business related purposes requires an equal allocation of the expenses and depreciation incurred in connection with [the home]. Thus 50 percent of the expenses and depreciation are deductible . . . .” Id. at 107.
130. 60 T.C. 304 (1973), appeal docketed, No. 74-1484, 9th Cir., Mar. 21, 1974.
131. Id. at 315.
132. The reason for the non-acceptance of the Commissioner's contention was that a time dimension that represented business use to total availability for use was based on “[T]he erroneous and distorting assumption that a dual-use facility is not, when unused, just as much available for business use as it is for nonbusiness use.” Id.
133. Id. at 314.
135. The court determined that “the 'work areas' were actually in use not more than some 8 hours a day.” 60 T.C. 304, 315 (1973).
subtracting sleeping time (eight hours per day). Thus, since the petitioner used the home office two hours per night, the appropriate time dimension of the space-time formula was 2/8 and not 2/24, as the Commissioner argued it should be.\textsuperscript{135} The court's definition of total use as eight hours was constructed upon the assumption that during both the eight hour sleep and work periods, the home office was not being used. Although the home served substantially personal motives during those times, the motives must be couched in terms of availability for use rather than actual use if the reasoning of \textit{International} and \textit{Gino} is to be consistent.\textsuperscript{137}

\textit{Gino} advanced \textit{International} by requiring that the concept of total or actual use must be decided upon a critical evaluation of how the various periods of the day are spent by the taxpayer. \textit{Gino}, however, did not advance \textit{International} to the point where the taxpayer is now able to apply a fixed time dimension with a common denominator of eight hours to every home office case.\textsuperscript{138} Nor does it presume to do so. Determinations of the amount of time spent must be an individual case by case undertaking. Allowances must be made for holidays, vacations, weekends and other factors tending to appreciably affect the actual time spent at home. \textit{Gino} does not require the taxpayer to arrive at a total

\begin{enumerate}
\item In \textit{Gino}, the home office was not comprised of the petitioners' bedrooms. If, however, part of the schoolteachers' work spilled over into a portion of their bedroom an argument could well be made that the denominator of the time dimension should have been 16 rather than 8 or 24 since the bedroom which doubled as a part of the home office was "used" during the eight hour period. It is possible that \textit{Gino} might persuade taxpayers to make sure that their home offices are not part of their bedrooms, lest their deduction be smaller than it has to be. The fairness of increasing the denominator to 16 or even 24 (in the cases where the taxpayer may live in a one room efficiency apartment) is certainly questionable. This might be considered to be a form of discrimination against the employee. See note 163 infra.

Along the same line, the recommended legislation of the House Ways and Means Committee would codify the discrimination against the employee who is unable to set aside an area of his residence which will be \textit{exclusively} used for business purposes. See note 159 infra at § 280 (c)(1).

A finding that the home was actually used during these periods would necessitate that these periods be included in the calculation of a time dimension even if the use was exclusively personal. That is, to say that the home was used during those periods, albeit for personal purposes, would be inconsistent with saying that it was not used at all. Therefore, by not including those periods, it must be assumed that the \textit{Gino} court determined that during the two eight hour periods in question, the home office was only potentially available for use and therefore beyond the sphere of actual use; thus, the two eight hour periods in point were not included in the denominator of the dimension. See note 136 supra.

The court made this clear when it distinguished \textit{Henderson} from \textit{Gino}. 60 T.C. 304, 315 n.5 (1973).\textsuperscript{136}
\end{enumerate}
use figure that is exactly in harmony with reality. Indeed, the lack of conformity in many of our lives probably precludes us from doing so. The message of Gino is clear: the taxpayer must at least attempt a period-of-the-day break-down analysis in order that he may calculate a time dimension that is reasonable for his unique set of circumstances.

IV. The Legacy of Bodzin & Gino

Several problems are raised by Bodzin. The “appropriate and helpful” standard that is established is extremely low and, as a result, revenues to the government should decline as the number of taxpayers that will qualify for the home office expense deduction increases. Although the amount of the claimed deduction in Bodzin was relatively small, it may prove to represent only the “nose of the camel” in this area.

In addition to a drop in revenues, significant administrative burdens may be created for the Internal Revenue Service. As the deduction increases in its incidence, more taxpayers than had previously done so might itemize their deductions, finding that

139. The court stated: “We recognize that allocations of this type are necessarily imprecise, but they are required if justice is to be served.” Id. at 315.
140. Under the holding of the majority opinion, there would certainly be no professional person, and very few if any business people, who would not be entitled to deduct as a business expense some portion of the cost of rental of a home or the maintenance of a house since the great majority of such persons do professional reading and written work for themselves or their employers in their homes. In fact, this is probably true of the majority of persons interested in their work regardless of the type of work they do unless their work is purely mechanical in nature.

Stephen A. Bodzin, 60 T.C. 820, 827 (1973) (Scott, J., dissenting). This bothers the government and it intends to try to do something about it.

Because the Second Circuit Court of Appeals in New York upheld the Tax Court in an earlier case [New], the Treasury has been—and is widely expected to continue—appealing all such cases to other courts in the hope of finding one to back its view and, thus, create a situation where one appeals court disagrees with another.

Then the I.R.S. would be free to take the question for adjudication to the Supreme Court.

In the meantime, in the opinion of one attorney involved in the issue, the Service will definitely scrutinize these deductions and, if you are audited, will definitely make you prove them. “They want to put a stop to it because it’s draining their revenues and they know it,” he said, “So you better be able to prove that you work at home.”

Cole, Tax-Court Rulings Make Deductions For Home Offices Easier To Obtain, N.Y. Times, April 4, 1974, at 61, col. 6, 62, col. 3 (city ed.).
141. See note 73 supra.
142. 60 T.C. 820, 828 (1973) (Quealy, J., dissenting).
this “extra” deduction now makes itemization advantageous.143

143. Thus, the Bodzin standard may have a “tipping effect,” fostering taxpayer itemization. An earlier commentator forecasted the same result in examining the relaxation of the allowance standard brought about by Newi. Cf. 47 Indiana L.J. 546, 556 n.64 (1971). Although there are no available statistics as yet to check the accuracy of that prediction, it seems likely that the prediction was a good one.

A similar prediction with regard to Bodzin seem reasonable, especially with the deduction’s “fattening” after Gino. An illustration is called for to demonstrate Bodzin’s possible effect in this area. Assume the following for a single taxpayer, claiming only one personal exemption, who computes his tax liability under § 1(c) of the Code:

<table>
<thead>
<tr>
<th>Adjusted gross income</th>
<th>$15,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard deduction taken in lieu of $1,500 deductible expenses</td>
<td>2,000</td>
</tr>
<tr>
<td>Personal exemption</td>
<td>750</td>
</tr>
<tr>
<td>Total deductions</td>
<td>2,750</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>$12,250</td>
</tr>
<tr>
<td>Tax liability</td>
<td>$2,702.50</td>
</tr>
</tbody>
</table>

Further assume that Bodzin now makes the taxpayer eligible for a home office expense deduction. The taxpayer uses one room of a four room apartment, three hours per night to do work-related reading. He is out of the apartment eight hours per day (at work) and sleeps eight hours. The expenses of running the entire apartment (including rent, telephone, heat, electricity and cleaning) total $500 per month. The taxpayer would be allowed a home office expense deduction computed as follows:

\[
\frac{500}{4} = 125
\]

Expense of running portion of home devoted to business use for one month.

\[
\frac{3}{8} \times 125 = 46.88
\]

Expense of running home office for one month—incorporates required (Gino) time adjustment to reflect business use of the area.

\[
12 \times 46.88 = 562.56
\]

Home office expense for 12 months.

The taxpayer, who can now avail himself of this “extra” deduction, would now itemize total expenses of $2,062.50 ($1,500 + $562.50), which are greater than the standard deduction of $2,000.

It should be noted that in instances where the “tipping” phenomenon occurs, the increase in the total amount of deduction claimed will be less than the home office expense itself and, consequently, the reduction in revenue to the government will be somewhat less than would likely appear to be the case upon cursory analysis. In our example, the increase in deduction that will be taken by the taxpayer will be $62.56 ($2,062.50 - $2,000). Thus, the loss in revenue to the government when the taxpayer itemizes is only $18.14 computed as follows:

| Adjusted gross income                  | $15,000.00 |
| Other expenses that were not itemized before Bodzin | $1,500.00 |
| Home office expense                    | 562.56    |
| Personal exemption                     | 750.00    |
| Total deductions                       | 2,812.56  |
| Taxable income                         | $12,187.44 |
| Tax liability                          | 2,684.36  |
Since itemized returns are more cumbersome to process than returns where the standard deduction is elected,\textsuperscript{144} a forecast of an increased administrative workload does not seem unreasonable. Furthermore, the Bodzin standard is so low that many taxpayers who do not really deserve the deduction may be tempted to seek it. The Service would thus be saddled with the unpleasant task of individually scrutinizing home office deductions taken by taxpayers in order to weed out fraudulent and invalid claims. This would undoubtedly be time consuming and costly.

Another problem posed by Bodzin is caused by the vagueness of its “appropriate and helpful” standard. The inherent subjectivity of that term may make the home office deduction’s ultimate allowance a function of either the reviewing Internal Revenue Service agent’s conception of the “appropriate and helpful” standard as applied to the particular set of facts at hand or, frighteningly, his caprice.\textsuperscript{145} Hopefully, the danger of the taxpayer being entirely at the mercy of a reviewing agent will be somewhat lessened by the addition of an element of reason with which, after Bodzin, an agent must temper his concept of the term “appropriate and helpful.”

The examination of the validity of the home office deduction should, apparently, now focus on whether the claimed deduction seems reasonable in terms of its relationship to the taxpayer’s role as an employee in a particular field.\textsuperscript{146} The element of reason injected into the “appropriate and helpful” standard by Bodzin should help to ensure, more so than before, that an agent’s actions will better follow the spirit of §162, which is to allow as deductions for every taxpayer “all the ordinary and necessary expenses . . . of carrying on a trade or business.”\textsuperscript{147} The criterion of allowance before Bodzin could have conceivably resulted in a

\begin{align*}
\text{\textdollar2,702.50 (tax liability before itemization)} - \text{\textdollar2,684.36 (tax liability with itemization)} &= \text{\textdollar18.14.}
\end{align*}

\textsuperscript{144} 47 Indiana L.J. 546, 556 (1971).
\textsuperscript{146} This is the standard for allowance under § 212 of the Code. See Treas. Reg. § 1.212-1(d)(1957). The application of this concept to the home office area is logical. As one commentator points out:

[I]t can be argued that the maintenance of a home office is very closely related to the taxpayer’s employee-business. The work done in the home office is similar to the work done during regular business hours, or is work which is closely related to the taxpayer’s occupation . . . .

42 U. Cin. L. Rev. 741, 748-49 (1973). “Reasonableness,” however, has no place in the House Ways and Means Committee proposal for legislative reform. See note 159 infra at § 280(b)-(c).
\textsuperscript{147} Int. Rev. Code of 1954, § 162.
denial to a taxpayer of the deduction upon a determination that the work carried on at the home office, although bearing a reasonable relationship to his employee duties, did not clearly prove "helpful." Bodzin’s flavoring of the "appropriate and helpful" standard with reason now shifts the emphasis away from the expense's ultimate helpfulness to the employee's business, with the probable result of allowing almost all home office expenses as deductions that are well intentioned and legitimately incurred in the hope of furthering business ends. Section 162, by its very nature, exists to encourage taxpayer productivity; it allows all valid business expenses as deductions. The Bodzin standard places the home office deduction squarely within that section's scope.

Although a more rigid and cognizable criterion than "appropriate and helpful" would perhaps be more comforting to the taxpayer and the Service, an inflexible standard would surely have the effect of occasionally precluding the deduction where legitimate business expenses were incurred. Thus a subjective standard would seem preferable to any sort of inflexible standard such as the now defunct "condition of employment" test.

Yet the fact remains that utilization of the Bodzin standard will necessitate individualized administrative attention to keep a hold on the reins in this area. The question of whether the home office deduction has been brought into the realm of administrative infeasibility by Bodzin is very real. The likely increase in costs to the Service that should flow from an attempt to stop fraudulent claims, coupled with a probable increased incidence of itemized returns, will be imposing.

An argument in favor of the abolition of the deduction in the

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148. This shift is consistent with a recent move made in another § 162 area. The deduction of employment agency fees as ordinary and necessary business expenses used to turn upon whether a job was obtained as a result of the expenditure. Rev. Rul. 233, 1960-1 Cum. Bull. 57, as interpreted by Eugene A. Carter, 51 T.C. 932 (1969). Now, an employee who engages the services of an employment agency to obtain employment may deduct the agency's fees as § 162 expenses regardless of whether the agency is successful in securing employment for its client. See Leonard F. Cremona, 58 T.C. 219 (1972), noted in, 51 N. Carolina L. Rev. 154 (1972). This would appear to be the proper trend. The disallowance of expenses because of the absence of a realized benefit bears an illogical relation to § 162.

149. Of course, the taxpayer must be able to prove that the work carried on in the home office was not "incidental." See text accompanying notes 67-75 supra. Additionally, the home office may not be established solely for the taxpayer's convenience. See text accompanying notes 97-103 supra. The issue of convenience will necessitate a factual inquiry with each home office case. 42 U. Cin. L. Rev. 741, 749 (1973).

name of administrative simplicity and streamlining appears attractive at first blush. Yet, upon analysis of counterbalancing considerations, the case for abolishing the deduction becomes significantly less compelling. If the deduction were abolished while taxpayers incurred home office expenses, the effect would be to categorize the home office expense as one that is not a trade or business expense within the meaning of § 162.¹⁵¹ But clearly, when a home office is maintained, expenses are incurred which are more appropriately viewed as business expenses rather than personal ones.¹⁵² Furthermore, taxpayers might decide to cease working at home, knowing they will receive no tangible benefit from so doing; taxpayer productivity could decrease. Thus the abolition of the deduction would go far to undercut the statutory intent of § 162.

The abolition of the home office deduction does not seem warranted for yet another, perhaps greater, reason. There now exists in our tax system a certain discrimination against employees and in favor of employers. Only some of the employee's business expenses are deductible from gross income to arrive at adjusted gross income,¹⁵³ whereas all of an employer's business expenses are allowed as deductions from gross income.¹⁵⁴ In addition, a self-employed taxpayer is allowed to deduct all home office expenses from gross income in computing adjusted gross income; he is afforded the status of an employer.¹⁵⁵ It then follows that the employee is discriminated against because he is an employee.¹⁵⁶

¹⁵¹. The cost of subscribing to a taxpayer's work related journals are deductible expenses under § 162. Irving L. Shein, 21 P-H Tax Ct. Mem. 170 (1952). Thus, the abolition of the home office expense deduction would create the absurd situation in which the taxpayer would claim such subscription costs but would be denied a deduction for, in essence, reading the material.


¹⁵³. These are:
1) Reimbursed expenses — INT. REV. CODE OF 1954, § 62(2)(A);
2) Expenses for travel away from home — INT. REV. CODE OF 1954, § 62(2)(B);
3) Transportation expenses — INT. REV. CODE OF 1954, § 62(2)(C); and

¹⁵⁴. INT. REV. CODE OF 1954, § 62(1).

¹⁵⁵. This has been the case for quite some time. Verner S. Gaggin, 3 B.T.A. 19 (1925).

¹⁵⁶. Absent statutory mandates, it is not at all clear why a taxpayer's right to certain deductions should be conditioned on his employee or self-employed status.

[It is important to lay at rest any possible argument that petitioner's right to deduction must be denied because he was an employee rather than one who was self-employed. There is nothing in the law establishing any such distinction. If the expenses are "ordinary and necessary," proximately related to the taxpayer's work they are deductible.]

The abolition of the home office deduction would further penalize the employee because of his status. The case for abolition on the ground of simplifying the administrative process seems unconvincing when viewed against the backdrop of discrimination based upon one's economic status. Therefore, the Bodzin court was justified in effecting a significant relaxation of the criterion for the allowance of the home office deduction.

In the same vein, the Gino court made the proper move in adopting a more realistic and liberal actual use standard to be used when computing a home office expense deduction. The actual use standard articulated, based on a period-of-the-day breakdown analysis, more precisely reflects the "use" of a facility than did either the undefined actual use standard of International or its predecessor, the availability for use standard. Availability is a concept measured by potentiality, whereas the critical actual use standard of Gino, is a more reasoned standard based upon the unique circumstances of individual taxpayers. The Gino standard brings the taxpayer-employee closer to equality with the businessman who rents or owns business property and whose respective rental and depreciation expense deductions are unquestionably rooted in an actual use analysis. The employee may now claim a greater home office deduction than had heretofore been possible. The deduction is no longer one that is almost entirely watered down by a discriminatory time element.

Not unlike the holding in Bodzin, however, the Gino holding should increase the Service's workload. Although the actual use standard is an approximation that must be arrived at by analyzing how the various periods of a taxpayer's workday are spent, the resultant time element of the space-time allocation formula undoubtedly also incorporates a mysterious input of the taxpayer which reflects the maximum amount of the deduction he feels can be claimed without arousing the suspicion of the Service. Since Gino increases the potential amount of the deduction for most taxpayers, more is now at stake for the Internal Revenue Service. It may well be forced to scrutinize a greater number of claimed

157. See notes 120-39 supra and accompanying text.
158. The businessman is allowed a 100 percent deduction for rental and depreciation expenses even though the business might be in operation only eight hours a day. Since the business property is devoted exclusively to business ends, the fiction is created that it is "actually used" twenty-four hours a day. Therefore, Gino properly extends this "actual use" fiction to the employee who does not enjoy the luxury of possessing property that may be exclusively devoted to business.
home office deductions in order to guard against unreasonable approximations made by well-intentioned taxpayers, and outrageous approximations made by the overly zealous.

**CONCLUSION**

In the final analysis, it seems likely that Bodzin and Gino will be spurs to an increased administrative workload. Bodzin should increase the workload because the inherent subjectivity of the “appropriate and helpful” standard will increase borderline cases of allowance which demand administrative attention. Furthermore, the increased incidence of the deduction after Bodzin could have the effect of increasing the ranks of taxpayers who itemize. Likewise, Gino should increase the workload, because the actual use standard increases the potential size of the deduction. As a consequence, the Service will probably have to intensify its hunt for abuses of the standard’s application in order to keep revenues from shrinking.

Yet the swelling of the Service’s workload should be tolerated because of the counterbalancing equitable principles embodied by Bodzin and Gino. Contemplated legislative action that would essentially deny the effects of these cases is not warranted. Bodzin has placed the home office deduction on an equal footing

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159. A tentative draft of legislation prepared by the House Ways and Means Committee would add a new Code section, selected portions of which follow:

**Sec. 280. Disallowance of Certain Expenses in Connection with Business Use of Home, Rental of Vacation Homes, Etc.**

(a) **General Rule** — Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an electing small business corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

(c) **Exception for Certain Business Use** —

(1) **In general**. — Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis as —

(A) the taxpayer’s principal place of business, or

(B) a place of business which is used by patients, clients, of customers in meeting or dealing with the taxpayer in the normal course of his trade or business. In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer.

(2) **Certain Home Industries**. — In the case of any trade or business of a kind customarily carried on in the home as a sole proprietorship, if the home is the principal place of business and if the activities conducted outside the home are merely incidental to the conduct of such business —
with all other legitimate business deductions, as it should always have been;\textsuperscript{160} the taxpayer need only prove that he engages in

\begin{itemize}
\item[(A)] paragraph (1) shall be applied without regard to the requirement of exclusive use but
\item[(B)] the deductions directly related to the use of the dwelling unit which are allowable under this chapter for the taxable year by reason of their being attributable to such trade or business shall not exceed an amount equal to the excess (if any) of—
\begin{itemize}
\item[(i)] the gross income derived from such trade or business during such taxable year, over
\item[(ii)] the sum of the deductions allocable to such trade or business which are allowable under this chapter for the taxable year whether or not the taxpayer was engaged in such trade or business and the deductions which are allowable under this chapter for the taxable year by reason of their being attributable to such trade or business and which are not directly related to the use of the dwelling unit.
\end{itemize}
\end{itemize}

\textbf{(d) Rental Deductions Allowed Only to Extent of Rental Income.}—In the case of any dwelling unit which is used by the taxpayer during the taxable year as a residence, subsection (a) shall not apply to any item to the extent such item is attributable to the rental of the dwelling unit or portion thereof (determined after the application of subsection (f)), but the deductions allowable under this chapter for the taxable year by reason of their being attributable to such rental shall not exceed the excess of—

\begin{itemize}
\item[(1)] the gross income derived from such rental for the taxable year, over
\item[(2)] the deductions allocable to such rental which are allowable under this chapter for the taxable year whether or not such unit (or portion thereof) was rented.
\end{itemize}

\textbf{(e) Use As Residence.}—

\begin{itemize}
\item[(1)] In General.—For purposes of this section, a taxpayer uses a dwelling unit during the taxable year as a residence if he uses such unit (or a portion thereof) for personal purposes for a number of days which exceeds the greater of

\begin{itemize}
\item[(A)] 7 days, or
\item[(B)] 5 percent of the number of days during such year for which such unit is rented at a fair rental.
\end{itemize}
\end{itemize}

\textbf{(f) Allocation of Expenses.}—In any case where a taxpayer who is an individual or an electing small business corporation uses a dwelling unit for personal purposes on any day during the taxable year, the amount deductible under this chapter with respect to expenses attributable to the rental of the unit or portion thereof (whether or not subsection (d) applies to such rental) for the taxable year shall not exceed an amount which bears the same relationship to such expenses as the number of days the unit or portion thereof is rented at a fair rental value for such year bears to the total number of days during such year that the unit or portion thereof is used. This subsection shall not apply with respect to deductions which would be allowable under this chapter for the taxable year whether or not such unit or portion thereof was rented.

\textsuperscript{160} The point that the home office deduction should always have been treated like
employment-related work at home in order to claim a home office expense deduction. Gino's actual use standard has taken the legitimate deduction from one that had an undeserved status of virtual tokenism and given it a deserved maturity by increasing its potential amount.

The principles of these cases should be codified by either Congress or the Treasury Department to ensure that the home office deduction's new status will be given the type of recognition that all deductions should enjoy. Codification might also have the beneficial effect of making the deduction somewhat more uniform

any other deduction is not without its critics. Professor Halperin, in a recent article, Uniform Approach, supra note 14, argues for a re-thinking through of the problems associated with business deductions for things which arguably are personal in nature. Addressing himself specifically to the home office, Professor Halperin proposes that "... because of the very real doubt as to the benefit..." of a home office, the significant personal satisfaction realized from the area in use, and the fact that the home office "expense" is an expense that would otherwise be incurred by the taxpayer (id. at 914), in cases where the primary purpose in acquiring the space is personal, a deduction should be totally denied. In instances where the primary purpose of acquisition is business, he would resurrect the actual business use to total availability for use ratio of Revenue Ruling 62-180. Furthermore, where personal use of a business portion of the home is significant, Professor Halperin would not seem to be uncomfortable with total disallowance of a deduction. Id. at 915.

Professor Halperin's underlying assumption of the doubt as to the benefit of working at home is, at the very least, questionable. Also, his apparent desire for a finding of taxpayer intent vis a vis the acquisition of a home office would demand a potentially cumbersome administrative determination on a case by case basis.

But, even beyond this, his proposal does not seem true to the spirit of § 162, which does not mention taxpayer intent. But see note 93 supra wherein Judge Quealy's dissent in Bodzin is analyzed. Actual expenditures reflective of actual use of a facility more closely follows § 162. Thus, adherence to Revenue Ruling 62-180's time allocation ratio would not be justified. Similarly, denying a deduction upon a finding of significant personal use of an area, irrespective of primary business use, is not warranted.

Finally, although basing a substantial part of his analysis on the terms "significant" and "insignificant," Professor Halperin fails to give any guidance as to how these terms are to be gauged. The case-law-derived "regular" requirement (see notes 67-75 supra, and accompanying text) should apparently be discarded and in its place Professor Halperin envisions a "significance" standard being used. What is "significant" would require an individual factual inquiry; the prospects for this new suggested inquiry inviting administrative problems and, ultimately, litigation are great.

161. See note 149 supra.

162. Probably the most useful type of codification would be in the form of either a new Revenue Ruling or Treasury Regulation which sets forth numerous examples illustrating valid as well as invalid home office deductions. The area does not easily lend itself to a two or three paragraph capsule of the law. Something of a "feel" for the relevant considerations should be sought by the taxpayer in order to decrease the likelihood of an error which could lead to the unpleasant experience of an audit. Well explained examples seem to offer the greatest hope for the taxpayer to grasp the relevant principles involved.

For an earlier, unsuccessful attempt by Congress to alter the nature of the deduction see U.S. Dep't of Treasury, Proposals for Tax Change 111 (1973).
in its application and, therefore, might subsequently hold down the increased administrative burden that Bodzin and Gino portend. However, even if codification does not have such a moderating effect on the Service’s increased workload, and the cries of decreased revenues and administrative infeasibility are heard, the deduction should nevertheless be considered a basic right of every employee who works at home that should not be compromised. Expediency is a lame excuse for sacrificing equity. 163*

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163. Not surprisingly, this view is not embraced by the House Ways and Means Committee. See note 159 supra. The Committee Proposal would clearly penalize the taxpayer who cannot devote, on an exclusive basis, a portion of his dwelling to his work. See Committee Proposal, supra note 159 at § 280(c)(1) and note 136 supra.

Apparently, the exclusive use criterion was incorporated into the Committee Proposal in an effort to render the deduction less vulnerable to taxpayer abuses. Although well-intentioned, the Committee might have overreacted. The Committee Proposal would mandate that a taxpayer be denied a deduction if there exists in one’s home only minimal personal use of the business portion. Analogously, consider whether a business should be denied a business expense deduction for office rental if an executive occasionally sleeps overnight at the office.

The Committee Proposal would also obfuscate the appropriate and helpful requirement as developed and refined by years of litigation. In its place would be the requirement that the work done at home is done “for the convenience of [the] employer.” See note 159 supra at § 280(c)(B). If the intent of switching standards is to make the applicable criterion more readily cognizable, the Committee has again missed the mark. The “convenience” language echoes the ambiguous Treas. Reg. § 1.119-1 (1956) where the cost of an employee’s employer-furnished meals vis a vis inclusion in the employee’s gross income is in question. See Rev. Rul. 411, 1971-2 Cum. Bull. 103. The “convenience” test is apt to be as subjective as an appropriate and helpful determination, and probably not as reflective of the “ordinary and necessary” requirement of the Code upon which the standard is grounded. In fact, it is quite probable that the “convenience” test would increase both the flow of litigation surrounding this area and the level of administrative problems as taxpayers, the Service and the courts attempt to develop the meaning of this concept in a new context.

* The Bodzin appeal was argued on December 2, 1974.