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Tax Rules and Rulings Specifically Applicable to Members Of Congress

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Legislative Attorney
American Law Division

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Summary

This report examines provisions of federal law, and interpretations thereof, which provide tax rules with specific applicability to Members of Congress. These include rules applicable only to Members and rules that, while generally applicable, apply in some specific way to Members. Topics covered include: immunity from certain State and local income and personal property taxes; specific rules for certain items which must be included in gross income for federal tax purposes (including honorarium and official allowances); rules allowing certain amounts to be excluded from gross income; and rules regarding allowable deductions. This last topic includes discussion of deduction of: a Member's living expenses incurred in the Washington metropolitan; other business expenses; charitable contributions; and moving expenses.

Contents

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This report examines provisions of federal law, and interpretations thereof, which provide tax rules with specific applicability to Members of Congress. These include rules applicable only to Members and rules that, while generally applicable, apply in some specific way to Members.

Immunity From State and Local Taxes

Income Taxes

The Rule: A Member of Congress does not have to pay income taxes to any of the State or local jurisdictions in the D.C. metropolitan area, unless such Member represents such State or a district in such State.[1]

Explanation: A provision of federal law (not part of the Internal Revenue Code (IRC)) provides that no State (or any political subdivision thereof, such as a county) in which a Member of Congress "maintains a place of abode for purposes of attending sessions of Congress" is permitted, for purposes of any income tax imposed by the State (or political subdivision), to treat that Member as a resident or domiciliary of the State (or political subdivision) or to treat any compensation paid by the United States to that Member as income subject to any such income tax. This provision does not grant immunity to a Member who represents such State or a district in such State. For purposes of this rule, the term "State" is specially defined to include the District of Columbia.[2] Consequently, a Member of Congress does not have to pay any income tax imposed by any of the jurisdictions that constitute the greater Washington, D.C., metropolitan area unless the Member represents that jurisdiction or the State or congressional district imposing the tax.

This tax exemption does not extend to a Member's spouse or dependents who earn income in the Washington, D.C., metropolitan area. This fact might necessitate a Member and spouse filing separate state returns even though they had filed a joint federal return.[3]

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[1] 4 U.S.C. §113(a).

[2] 4 U.S.C. §113(b)(2).

[3] *See*, D.C. Code Ann. § 47-1805.01, Md. Code Ann., Tax-Gen § 10-807, and 58.1 Va. Code Ann. § 324.

Personal Property Taxes

The Rule: A Member of Congress does not have to pay personal property taxes to any of the State or local jurisdictions in the D.C. metropolitan area, unless such Member represents such State or a district in such State.[4]

Explanation: Members of Congress are exempt from State or local personal property taxes imposed by the jurisdictions comprising the greater Washington, D.C., metropolitan area. Again, a provision of federal law (not part of the IRC) provides that no State (or any political subdivision thereof) in which a Member of Congress (other than a Member who represents the State or a congressional district located within the State) "maintains a place of abode for purposes of attending sessions of Congress" is allowed to "impose a personal property tax with respect to any motor vehicle owned by such Member." For purposes of this rule, the term "State" is specially defined to include the District of Columbia.[5] Consequently, a Member of Congress is immune from the personal property tax which Virginia counties and cities impose on motor vehicles. This immunity extends explicitly to such taxes on motor vehicles owned by the spouse of a Member.

What Constitutes Income

The IRC defines the term "gross income" to mean "all income from whatever source derived."[6] The term is broad enough to include any economic or financial benefit conferred on an employee as compensation, whatever the form or mode by which it is effected[7] and all accessions to wealth clearly realized, over which the taxpayer has complete domination.[8] Because of the breadth of this definition, in addition to the salary a Member of Congress is paid as compensation for performing official duties, certain other amounts which may be received from other sources during the taxable year have explicitly been held to be includable in the Member's income for federal tax purposes. Many of the rulings discussed were issued prior to the enactment or passage of a prohibition against receiving that particular type of income.

Certain special types of receipts collected by a Member of Congress have explicitly been held to be “income” for federal income tax purposes. These types of receipts are certain excess or unsubstantiated official allowances for transportation and certain amounts received from private sources -- such as, honoraria; third-party payments for certain office-related expenses (i.e. the costs associated with newsletters, the expense of operating intern programs, and the costs of official travel

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[4] Pub. L. 99-190, as amended by Pub. L. 100-202, codified as a note to 4 U.S.C.§ 113.

[5] *Ibid.*

[6] 26 U.S.C. § 61.

[7] *Commissioner* v. *Smith*, 324 U.S. 177 (1945).

[8] *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).

to the extent not reimbursed from official sources); and campaign contributions converted to personal use.

Official Allowances

The Rule: Official allowances generally are not includable in a Member's gross income because they do not generate an accession to the Member's personal wealth and because the Member does not have complete dominion over them. Certain excess payments of travel reimbursements can give rise to income.[9]

Explanation: Rev. Rul 77-323 does find that certain travel allowance or reimbursement payments are includable in income. The first instance is the case of allowances or reimbursements received by a Member in excess of amounts actually paid as ordinary and necessary expenses for official transportation that was not "away from home" (*e.g.*, allowances or reimbursements the Member received that were in excess of amounts the Member actually spent for such expenses as taxi fares for travel within the Washington, D.C., metropolitan area).[10] Citing 26 C.F.R. § 1.162-17(b)(1), the ruling states:

> ... an employee need not report on the tax return expenses for travel, transportation, entertainment, and similar purposes paid or incurred solely for the benefit of an employer if such employee is required to account and does account to the employer. The expense involved are those that are charged directly or indirectly to the employer or for which the employee is paid through advances, reimbursements, or otherwise, provided the total amount is equal to such expenses. In such a case, when reporting, the taxpayer need only state that the total of amounts charged directly or indirectly to the employer and received from the employer as advances or reimbursements did not exceed the ordinary and necessary business expenses paid or incurred by the employee.
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> Section 1.162-17(b)(2) of the regulations provides that if the total of amounts charged directly or indirectly to the employer as advances, reimbursements, or otherwise, exceeds the ordinary and necessary business expenses paid or incurred by the employee and the employee is required to and does account to the employer for such expenses, the taxpayer must include such excess in income and so state on the return.[11]

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[9] Rev. Rul. 77-323. While this ruling includes descriptions of various types of allowance payment schemes that are no longer used by the House of Representatives, its approach generally, and conclusions as to the taxability of travel expense reimbursements specifically, reflect current law.

[10] For purposes of rules relating to travel while not "away from home," the tax "home" of a Member of Congress is the place where the Member pursues their trade or business, i.e. Washington, D.C.

[11] Rev. Rul. 77-323.

Therefore, it is only the excess, if any, of receipts (in the form of official allowances or reimbursements) over amounts actually spent for local travel, transportation, entertainment, and similar purposes, that must be included in a Member's income.

The other exception to the general rule that official allowances are not includable in a Member's gross income involved allowances or reimbursements to a Member for travel expenses incurred in connection with travel while "away from home" (e.g., travel away from the Congressional District which the Member represents in Congress).[12] With respect to reimbursement of such expenses, the ruling noted that IRC § 274(d) and a regulation prescribed thereunder[13] disallow any business-expense deduction under IRC § 162 for away-from-home travel expenses unless the taxpayer substantiates the amount of the expenses and the time, place, and business purpose of the travel. Drawing on those restrictions on the deductibility of away-from-home travel expenses, the ruling concluded that failure to substantiate relevant expenses would render the total amount of reimbursement collected by the Member during the taxable year includable in his or her gross income. The ruling went on to note in this connection that, in lieu of detailed documentation, a recognized *per diem* allowance or fixed mileage allowance could be used to determine the amount of relevant expenses. However, the ruling also pointed out that, if a standard fixed mileage allowance higher than that recognized by the IRS for other taxpayers is used for reimbursement purposes, then any portion of the allowance collected by the Member in excess of expenses actually paid or incurred must be included in gross income.[14]

Illegal or Prohibited Payments

Generally the legality of the activity producing income is not relevant to the taxation of the income. The IRS has ruled on the inclusion of income[15] to a Member of funds from many sources which are now prohibited by statute or rule. The viability of the rulings is not affected by the subsequent prohibition or limitation.[16]

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[12] For ordinary taxpayers, "home" for tax purposes is deemed to be the principal place of business. Thus, for an ordinary individual who works in Washington, D.C., and lives in one of the surrounding jurisdictions, "home" is Washington. However, solely for purposes of the deduction that is allowed under IRC §162 for the expenses of business related travel while "away from home," a Member of Congress is subject to a special rule according to which a Member's tax "home" is deemed to be the District or State he or she represents in Congress. This special rule is discussed in significantly greater detail elsewhere in this report.

[13] 26 C.F.R. § 1.274-5.

[14] Rev. Rul. 77-323.

[15] It should be noted that where the IRS has ruled on the includability of income it has also recognized the deductibility of expenses incurred in obtaining the funds.

[16] The focus of this section is on the tax implications of receipt of illegal or prohibited payments. For a discussion on the limitations, *see*, CRS Congressional Distribution Memorandum: Outside Income Limitations On Senators and Members of the House of Representatives, by (nam e/redacted) (February 27, 2003).

The Rule: Illegal and/or prohibited payments are includable in gross income under IRC § 61.

Explanation: Payments received as a result of kickbacks,[17] extortion,[18] embezzlement,[19] and bribery[20] have been found to result in income to the recipient. A taxable event has occurred so long as the recipient has exercised command and dominion over the funds.

The IRS has held that, if a contributor receives from a "political officeholder" a promise that is not of a "traditional and legitimate political nature" to perform some service (for example, a promise to "direct the appropriate governmental office to renew the business license of the contributor") in exchange for a payment from the contributor to a political campaign specified by the officeholder, then the amount of the payment concerned must be included in the officeholder's gross income.[21]

There are criminal prohibitions specifically on Members receiving certain types of payments. Members may not receive either earned[22] income or unearned [23]income derived from contracts with the federal government. Members may not receive any compensation for representation of private parties before any agency or department of the federal government.[24] Members, as “federal officials,” are prohibited by the Constitution from receiving compensation for services from any foreign government or official foreign interest.[25]

Federal statute prohibits a member from converting excess campaign funds to personal use.[26] For many years relevant tax law has required a Member who converts campaign funds to personal use to include the amount so converted in his or her gross income. Case law to this effect dates at least as far back as 1934.[27] Statutory law which implies that converted campaign funds must be included in gross income is currently set out at IRC § 527(d), which specifies certain dispositions of campaign funds that are not treated as income to a candidate (and thus suggests that other

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[17] *Lydon* v. *Commissioner*, 351 F. 2d 539 (7th Cir. 1965).

[18] *Rutkin* v. *United States*, 343 U.S. 130 (1952).

[19] *James* v. *United States*, 366 U.S. 213 (1961).

[20] *United State*s v. *Commerford*, 64 F. 2d 28 (2d Cir. 1933).

[21] Rev. Rul.75-103.

[22] 18 U.S.C. § 431.

[23] 18 U.S.C. §§ 431 and 433.

[24] 18 U.S.C. § 203.

[25] Article I, Section 9, cl. 8.

[26] 2 U.S.C. § 439a.

[27] *Paschen* v. *United States*, 70 F.2d 491 (7th Cir, 1934).

dispositions must be so treated). Current regulations prescribed under IRC § 527 explicitly require converted campaign funds to be included in gross income.[28]

The rules of the House and Senate and the Ethics Reform Act of 1989[29] place limits and/or prohibitions on certain types of income. Prohibited income includes: honoraria;[30] income for service on boards of directors;[31] income from practice of a profession;[32] and income for affiliating with a firm.[33] The primary limit on a type of income is a cap on outside earned income.[34] The fact that the payment is illegal, prohibited, or beyond a limit does not affect its inclusion in gross income for federal tax purposes.

The rules of the House and the Senate prohibit the maintaining of "unofficial office accounts."[35] In the past, the IRS has ruled donations to these types of accounts for such purposes as newsletters,[36] intern programs (not all intern programs are considered "unofficial office accounts),[37] and trusts to finance official travel[38] were

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[28] *See,* 26 C.F.R.. § 1.527-5.

[29] Pub. L. 101-194.

[30] Although the statutory honoraria ban of the Ethics Reform Act of 1989 was declared unconstitutional by the Supreme Court in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995), both the House and the Senate have adopted internal rules that prohibit any Member from receiving such payments. House Rule 25, cl.1(a)(2) and Senate Rule 36.

[31] 5 U.S.C. app. § 502(a)(4); House Rule 25, cl. 2(d); Senate Rule 37, cl. 6(a), (b).

[32] 5 U.S.C. app. § 502(a)(3); House Rule 25, cl. 2(c); Senate Rule 37, cl. 5(b)(3).

[33] 5 U.S.C. app. § 502(a)(1, (2)); House Rule 25, cl. 2(a), (b); Senate Rule 37, cl. 5(b)(1), (2).

[34] 5 U.S.C. app. § 501(a); House Rule 25, cl. 1(a)(1); Senate Rule 36.

[35] House Rule 24; Senate Rule 38.

[36] Rev. Rul.73-356 held that subscription charges or solicited donations received by a Member of Congress for use solely to defray publication and distribution costs of newsletters and other constituent reports or questionnaires have been held by the Internal Revenue Service to be includable in the Member's gross income. IRC § 527(g) allows newsletter fund of Members to be taxed as "political organization." House Rule 24 explicitly includes IRC § 527(g) newsletter funds in "unofficial office accounts which are prohibited by the rule. Senate Rule 38 is explicit but nevertheless appears to hold such accounts to be prohibited.

[37] Rev. Rul. 75-146 held that donations solicited by a Member of Congress to defray the expenses of maintaining at least one type of intern program have been held by the Internal Revenue Service to be includable in the Member's gross income. One feature of the program described in the ruling was that participating interns spent part of their time in the Member's office performing services identical to those performed by the Member's regular compensated staff personnel.

[38] Rev. Rul.76-276 held that contributions to a trust established to finance travel by a Member of Congress and that Member's staff in performing official duties are not excludable "gifts" within the meaning of IRC §102 but rather must be included in the

(continued...)

includable in the Member's income. The fact that these accounts are now prohibited does not effect the reasoning underlying these rulings.

As to honoraria, there are two areas of regulation which could affect a Member's taxes. First, actual and necessary expenses incurred by a Member in the course of an honorarium event may be paid or reimbursed by another person, and are not considered part of an "honorarium."[39] These payments or reimbursements would be treated for tax purposes generally in the same manner as allowances, discussed above.

Second, a Member may direct an honorarium payment be made to a charitable organization on the Member's behalf and not be in violation of the honorarium ban[40] or be required to include the honorarium in income.[41] Formerly, when a Member directed the party offering an honorarium to pay the amount concerned to a charity, the Member was required to include the amount in gross income and then the Member could deduct the amount as a charitable contribution, if the Member itemized deductions. Now, IRC § 7701(k) states the following rule:

> TREATMENT OF CERTAIN AMOUNTS PAID TO CHARITY. -- In the case of any payment which, except for section 501(b) of the Ethics in Government Act of 1978 [*i.e.*, 5 USC Appendix 7 §501(b)], might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170(c) [*i.e.*, a public charity] --
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> > (1) such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of any State or political subdivision thereof, and
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> > (2) no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.
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> For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

The Ethics in Government Act is more restrictive than the IRC provision. The amount of the honorarium which may be paid to a charity on a Member's behalf is limited to $2,000 and a qualified charity does not include any organization from

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[38](...continued)
Member's gross income.

[39] House Rule 25, cl. 1(a)(2); Senate Rule 36.

[40] 5 U.S.C. app. § 501(c).

[41] IRC § 7701(k).

which the Member or a Member's parent, sibling, spouse, child, or dependent relative derives any financial benefit.

Death Gratuity

A death gratuity paid from the contingent fund of the House of Representatives or the Senate has been held to be a "gift" which the recipient was entitled to exclude from gross income.[42]

Deductions

There are some deductions which the Internal Revenue Code allows generally in the case of any taxpayer but which can have a specific application in the case of a Member of Congress. The discussion immediately below focuses on such deductions.

Ordinary and Necessary Business Expenses

A deduction for ordinary and necessary business expenses paid or incurred during the taxable year is allowed under IRC §162. There are several types of business expenses which Members of Congress incur that are different, or are treated differently, than those of other taxpayers.

A Member's Capital Area Living Expenses.

The Rule: Some (not all) Members of Congress are allowed a deduction of up to $3,000 for personal living expenses they incur while residing in the Washington, D.C., metropolitan area.

Explanation: All taxpayers are allowed to claim business-expense deductions under section IRC § 162(a)(2) for unreimbursed traveling expenses (for example, the costs of lodging, meals, and incidental expanses such as dry cleaning)[43] which they incur while "away from home" in the pursuit of a trade or business. To qualify, expenses must be incurred at, going to, or returning from a place that is distant enough from the taxpayer's "home" as to require a stop for sleep or rest. For purposes of this section, the "home" of a taxpayer is that taxpayer's principal place of business, which may be different from his or her place of abode (for example, someone who lives in New Jersey but who commutes daily to New York to work, New York is the individual's "home" for purposes of this deduction). Absent any specific rule to the contrary, the "home" of a Member of Congress for purposes of this deduction would be Washington, D.C. (*i.e.*, his or her principal place of business). Generally, a

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[42] Rev. Rul. 55-609.

[43] Interest and taxes payable in connection with ownership of real and personal property are not contemplated expenses under this provision. In other words, deductions for those expenses are not subject to the $3,000 ceiling and may be claimed to the full extent they might be claimed by any other taxpayer.

taxpayer's unreimbursed traveling expenses incurred while away from the principal place of business are deductible without limit.

However, there is a specific rule for treatment of these expenses for Members of Congress contained in IRC § 162(a). The first sentence of this section sets out the general rule, explicitly designating "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business" to be among the ordinary and necessary business expenses for which a deduction may be claimed. The second sentence provides the specific rule for treatment of Member's expenses, stating:

> For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.[44]

This rule differs from the more general in two important respects: (1) a Member's "home" for relevant purposes is not the Member's regular or principal place of business but rather is the State or congressional district the Member represents in Congress and (2) unreimbursed traveling expenses incurred while away from the "home" designated by the statute are not deductible without limit but rather are subject to a $3,000 ceiling.

This rule means that while a Member of Congress is residing in the Washington, D.C., metropolitan area to perform official duties, the Member may deduct up to $3,000 worth of expenses for meals and lodging (and incidental expenses) if they otherwise qualify as "traveling expenses." That is, so long as the Member's "home" is far enough from Washington, D.C., that a trip there would require a stop for rest or sleep. A Member whose "home" is nearer than that is not eligible to deduct any living expenses incurred in the Washington, D.C., metropolitan area.[45]

In connection with lodging expenses, the IRC generally disallows all deductions, including deductions under IRC § 162(a), with respect to any "dwelling unit" used by a taxpayer during the taxable year as a "residence."[46] For purposes of this disallowance, a "dwelling unit" (such as a house, an apartment, or a condominium) is considered used a "residence" if it is used "for personal purposes by the taxpayer

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[44] IRC § 162(a)(2).

[45] It should be noted that the special designation of a Member's tax "home" only applies for purposes of living expenses incurred *by the Member*, not those incurred by the Member's spouse or any other relative residing with the Member in his or her Washington-area abode. This observation complicates computation of the amounts of both types of expenses. Another complicating factor in the case of expenses incurred for meals in the Washington, D.C., metropolitan area is that such expenses appear to be subject to the 50 percent limitation imposed under IRC § 274(n).

[46] IRC § 280A

... or by any members of the family of the taxpayer" for more than fourteen days in the taxable year.[47] There is an exception to this rule which states:

> Nothing in this section shall be construed to disallow any deduction allowable under section 162(a)(2) ... by reason of the taxpayer's being away from home in the pursuit of a trade or business ... .[48]

Since it is precisely "by reason of the taxpayer's being away from home in the pursuit of a trade or business" that a Member's expenses for lodging in the Washington area give rise to a "deduction allowable under section 162(a)(2)," the exception would apply and the general rule under which personal use of a dwelling unit would render such expenses nondeductible is disregarded. Consequently, in the case of any Member of Congress who is "away from home" while residing in the Washington, D.C., metropolitan area, lodging expenses are deductible even if the Member's family occupies the same dwelling unit.

If living expenses are deducted under IRC §162, those same expenses may not also be deducted under some other section of the Internal Revenue Code. Thus, for example, the Internal Revenue Service has explicitly ruled that a Member of Congress is not permitted to deduct the same item simultaneously as both a "traveling expense" under IRC §162 and a "moving expense" under IRC §217.[49]

Substantiation And Use Of A Per Diem Rate.

No deductions under IRC §162 for traveling expenses are allowed unless substantiated by adequate records or sufficient corroborating evidence as to the amount, time and place, and business purpose of such expense.[50] Pursuant to a statutory mandate,[51] which was subsequently repealed,[52] the Secretary of the Treasury issued temporary regulations prescribing amounts deductible (without substantiation) pursuant to the Member's rule of IRC § 162(a)."[53] Those temporary regulations have not been rescinded. The various types of living expenses contemplated in the temporary regulations are:

> Meals include the actual cost of food and expenses incident to the preparation and serving thereof. Lodging includes amounts paid for rent, care of premises, utilities, insurance and depreciation of household furnishings owned by the Member. In the case of a Member who lives in a residence owned by him in the Washington, D.C. area, the cost of lodging also includes depreciation on such residence. Other incidental

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[47] IRC § 280A(d)(1) & (2).

[48] IRC § 280A(f)(4).

[49] Rev. Rul. 73-468.

[50] IRC § 274(d).

[51] Pub. L. 97-119, § 113(b).

[52] Pub. L. 97-216, § 215(b).

[53] 47 F.R. 2986-2988 (January 21, 1982). Codified at 26 C.F.R. § 5e.274-8.

> expenses include laundry, cleaning, and local transportation. Local transportation includes travel within a 50 mile radius of Washington, D.C., whether by private automobile, taxicab or other transportation for hire.[54]

These temporary regulations set out two different methods which may be used to determine the amount of relevant living expenses a Member of Congress may deduct without substantiation. One method can only be used by a Member who both owns the residence occupied in the Washington, D.C., metropolitan area and deducts interest and taxes with respect to that residence. Using this method, the sum of living expenses deductible without substantiation is computed by multiplying two-thirds of a specified daily rate times the number of "Congressional days" falling within the taxable year.[55]

The other method is for use by two types of Members: (1) a Member who does not own the residence occupied and (2) a Member who, though an owner of the residence occupied, for some reason does not deduct either interest (*e.g.*, if the residence is not mortgaged) or taxes with respect to that residence. Under this method, the sum of living expenses deductible without substantiation is computed by multiplying the full amount of the same specified daily rate times the number of "Congressional days" falling within the taxable year.[56] For purposes of both methods, all days during the taxable year are considered "Congressional days" except those in periods lasting five or more consecutive days (including Saturdays and Sundays) during which the particular chamber in which the Member serves was not in session.[57] Of course, if a Member elects not to use either of the two special methods just described, relevant deductions may still be claimed. However, in such a case, the amounts of deductible expenses must be substantiated.[58]

The statute[59] and underlying regulations[60] set out a rather complex formula for coming up with the amount of relevant living expenses which may be deducted without substantiation. As a practical matter, given that the daily rate greatly exceeds $30 and there are at least 100 "Congressional days" during a particular year, it is safe to say that the entire allowed deduction of $3,000 may, absent unusual circumstances,

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[54] 26 C.F.R.. § 5e.274-8(b).

[55] 26 C.F.R.. § 5e.274-8(c)(1)(i).

[56]2 6 C.F.R.. § 5e.274-8(c)(1)(ii).

[57]26 C.F.R. § 5e.274-8(d).

[58] For guidance in such cases, see Rev. Rul. 80-62, as modified by Rev. Rul. 87-93.

[59] The temporary regulations refer to “the maximum amount of actual subsistence for Washington, D.C. payable pursuant to 5 U.S.C. § 5702(c)." At the time the temporary regulations were drafted, that provision, 5 U.S.C. § 5702(c), conferred authority to prescribe, by regulation, conditions under which a Government employee's "actual and necessary expenses of official travel" would be reimbursed when such expenses exceeded the amount of the "maximum per diem allowance" otherwise made available. That authority to prescribe such regulations is presently conferred under subsection (a)(1)(B) of 5 U.S.C. § 5702, rather than under subsection (c).

[60] 41 C.F.R. subpart 301-11.

be taken under these regulations without substantiation. However, if a Member leaves office relatively early in a taxable year (by virtue of retirement, death, resignation, or expulsion), it might be necessary to ascertain the exact daily rate and number of Congressional days served in the year.

The Two-Percent Floor On Miscellaneous Itemized Deductions And The Interaction Between It And The $3,000 Ceiling On Living Expenses.

The IRC contains a so-called "two-percent floor" on miscellaneous itemized deductions.[61] These "miscellaneous itemized deductions" are allowed to be deducted only to the extent they exceed, in the aggregate, two percent of the taxpayer's adjusted gross income. For example, if a Member of Congress has adjusted gross income of $200,000 for a particular taxable year, then the first $4,000 of his or her otherwise deductible miscellaneous itemized deductions cannot be claimed.

The Rule: The living expenses which are subject to the $3,000 ceiling are "miscellaneous itemized deductions" subject to the "two-percent floor." In applying the "ceiling" and the "floor," the "floor" is applied to all the "miscellaneous itemized deductions" first and then the "ceiling" is applied to the living expenses.

Explanation: The term "miscellaneous itemized deductions" means itemized deductions other than certain listed specified deductions.[62] The list does not include deductions allowed under IRC § 162. Therefore, living expenses deductable by Members of Congress under IRC § 162(a) are "miscellaneous itemized deductions" subject to the two-percent floor.

IRC § 67 explicitly states that "this section shall be applied before the application of the dollar limitation of the last sentence of section 162(a) (relating to trade or business expenses)."[63]

The "dollar limitation of the last sentence of section 162(a)" is, the $3,000 ceiling on deductible living expenses incurred by a Member of Congress in the Washington, D.C., metropolitan area. An example of the inter-working of the "ceiling" and "floor"is as follows:

> ... assume that a Member with AGI (i.e., adjusted gross income) of $100,000 has $5,000 of away-from-home expenses qualifying for the deduction (disregarding application of the $3,000 limit and the two-percent floor, but after application of the 50-percent rule for meal and entertainment expenses) and $5,000 of other miscellaneous itemized deductions, for a total of $10,000 of potential deductions subject to the two-percent floor. Application of the two-percent floor would limit these deductions to $8,000, and the amount disallowed because of the two-percent floor would be disallowed proportionately. Thus, after application

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[61] IRC § 67(a).

[62] *Id.*

[63] IRC § 67(f).

> of the two-percent floor, the Member could deduct $4,000 of the away-from-home expenses and $4,000 of the [other] miscellaneous itemized deductions. The former amount (i.e., the away-from-home expenses) is further limited to $3,000 because of the special limitation on deducting Member's expenses in sec. 162(a). Thus, the Member could deduct a total of $7,000 of miscellaneous itemized deductions.[64]

Other Away-From-Home "Traveling Expenses".

In addition to those living expenses incurred in the Washington, D.C., metropolitan area which are treated as "traveling expenses" by virtue of the second sentence of IRC §162(a), a Member may also deduct unreimbursed "traveling expenses" incurred for business travel that is not only "away" from that Member's tax "home" (i.e., the State or congressional district represented) but is also "away" from Washington. Ordinarily, substantiation of the amounts concerned is required. In this regard, the IRS has ruled that the *per diem* allowance specified in the Federal Travel Regulations for the locality involved and the mileage allowances specified by the IRS itself will satisfy the substantiation and adequate accounting requirements of Reg. §§ 1.162-17(b) and 1.274-5.[65] There is no limitation on the amount of these expenses which may be deducted.

Entertainment Expenses.

Determining the extent to which entertainment expenses are deductible is a multi-step process. As an initial matter, the expense must qualify as an ordinary and necessary business expense within the general meaning of IRC § 162. If it is, then the deduction must not be specifically disallowed under any of the special rules of IRC § 274(a). In a relevant ruling,[66] the IRS described three examples of entertainment expenses incurred by a hypothetical Member of Congress and held that only one of them would be deductible. The situation involving the expense held to be deductible was described as follows:

> A, a Member of Congress, pays for the lunch of a constituent whom A takes to a restaurant in order that A might have the time and opportunity to discuss a problem the constituent is having with an agency of the Government. A had no other time to discuss the constituent's problem.

According to the ruling, the discussion of the constituent's problem was evidence of the business-relatedness of the expense. The ruling concluded that, so long as the surroundings where the lunch was furnished were conducive to the discussion of business, the exception specified under IRC § 274(c)(1) applied and the expense was deductible.

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[64] *See*, H.Rept. 100-795 at page 9, footnote 7; S.Rept. 100-445 at page 10, footnote 9. For further examples, *see*, 26 C.F.R. § 1.67-1T(d).

[65] Rev. Rul. 80-62.

[66] Rev. Rul. 78-373.

By contrast, in the case of expenses incurred by a Member of Congress for a cocktail party and buffet to which a few constituents were invited but at which the surroundings were not conducive to the discussion of business, the ruling disallowed any deduction, citing 26 C.F.R. § 1.274-2(c)(7) to the effect that an expense cannot qualify as directly related to the taxpayer's trade or business if the entertainment concerned occurs under circumstances where there is little or no possibility of engaging in the active conduct of trade or business.

The third example involved expenses incurred by a Member of Congress for a party for his staff members, secretaries, and aides, all of whom were compensated out of his annual congressional hiring allowance. The ruling held that such expenses were not deductible. The rationale was that the exception to the general disallowance rule of IRC § 274(a) that is set out at § 274(e)(5) and that covers expenses for recreational, social, and similar activities primarily for the benefit of employees would not apply since Congress, rather than the individual Member, was the employer of those attending the party and thus the requisite employer-employee relationship between the individual incurring the expense and those benefitting from it was absent.

Certain Other Business Expenses.

Amounts paid from a Member's personal funds to defray the costs of reasonable salaries for staff employees who were in addition to those paid from official congressional allowances and who were needed to handle an unusually heavy workload have been held to be deductible business expenses incurred as an employee.[67] That same ruling also held, however, that costs similarly incurred for extra office equipment could only be recovered over time through deductions for depreciation (under IRC §§ 167 and 168) rather than all at once in the year in which they were actually paid.

A later ruling[68] amplified Revenue Ruling 73-464 to make clear that, under appropriate circumstances, not only staff salaries, but also office rent and "supplies" (i.e., items consumed within the taxable year) are deductible under IRC § 162(a).[69]

Legal expenses incurred by a Member of Congress in connection with litigation relating to congressional redistricting have been held to be nondeductible "personal" expenses of the kind contemplated by IRC § 262 rather than deductible business expenses within the meaning of IRC §162.[70]

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[67] Rev. Rul. 73-464.

[68] Rev. Rul. 84-110.

[69] *See, Frank* v. *United States*, 577 F.2d 93 (9th Cir. 1978), which held that expenses incurred by a Senate *staff employee* in performing official duties were deductible under IRC § 162 even though the sum of these expenses consistently exceeded that employee's annual Senate salary.

[70] Rev. Rul. 67-457.

Charitable Contributions

Like any other taxpayer, a Member of Congress is allowed a deduction under IRC § 170 for charitable contributions made during the taxable year. There have been a few rulings, however, which have specifically focused on charitable contributions made by Members of Congress. Several have confirmed the allowance of deductions for certain types of contributions. For example, a 1956 ruling held that a Member's return of a portion of his salary to the Treasury was a deductible charitable contribution.[71]

A deduction has been disallowed for the donation of a Member's congressional papers to a university. The essential rationale was that the Member had a zero basis in the materials donated.[72]

Moving Expenses

A deduction is allowed under IRC § 217 for moving expenses incurred during the taxable year in connection with the commencement of work by the taxpayer at a new "principal place of work." The IRS has specifically ruled that a claim of a deduction under IRC § 217 by a *new* Member of Congress for the expenses of moving to the Washington, D.C., metropolitan area is not inconsistent with a claim of a deduction under IRC § 162 for the same taxable year for living expenses incurred while residing in the Washington area.[73] The ruling did go on to point out, however, that the *same expenses* could not be deducted under both sections.

Contributions Returned to Donors

The IRS has ruled that contributions collected by a trust established to finance travel by a Member of Congress that remained unspent as of the date the trust was terminated and that were subsequently *returned to donors* could be deducted by the Member as a business loss.[74]

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[71] Rev. Rul. 56-126.

[72] *See*, *James H. Morrison*, 71 T.C. 64 (1979), affirmed *sub. nom. Morrison* v. *Commissioner*, 611 F.2d 98 (5th Cir. 1980).

[73] Rev. Rul.73-468.

[74] Rev. Rul.76-276. This ruling had also held that contributions to a trust established to finance travel by a Member of Congress and that Member's staff in performing official duties are not excludable "gifts" within the meaning of IRC §102 but rather must be included in the Member's gross income. *See*, discussion of illegal or prohibited payments.

Miscellaneous

Withholding

Subchapter A of the IRC[75] relates to "withholding from wages." For purposes of the rules regarding withholding, IRC § 3401(a) defines the term "wages" to mean, in pertinent part, "all remuneration ... for services performed by an employee for his employer. In its turn, IRC § 3401(c) then defines the term "employee" to include, *inter alia*, an ... elected official of the United States." Thus, federal income taxes must be withheld from congressional salaries.

Excise Tax on Acts of Self-Dealing with Private Foundations

If a Member of Congress participates in any act of "self-dealing" with a private foundation, the Member is subject to the heavy excise tax imposed under IRC § 4941. Various acts of self-dealing are described under subsection (d) of IRC § 4941 and under 26 C.F.R. §§ 53.4941(d)-1 and 53.4941(d)-2. All involve transactions or other dealings between a private foundation and a so-called "disqualified person." For relevant purposes, the term "disqualified person" is defined specifically to include an individual holding "an elective public office in the ... legislative branch of the Government of the United States."[76]

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[75] IRC §§ 3401 *et seq.*

[76] IRC §§ 4946(a)(1)(I) and 4946(c)(1)).