

[JOINT COMMITTEE PRINT]

DESCRIPTION OF TAX BILLS
RELATING TO
CERTAIN BUSINESS EXPENSES OF
STATE LEGISLATORS
(H.R. 365, H.R. 858, H.R. 2067, and H.R. 2605)

SCHEDULED FOR A HEARING
BY THE
SUBCOMMITTEE ON SELECT REVENUE MEASURES
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INTRODUCTION

The four bills described in this pamphlet relate to the income tax treatment of certain business expenses of State legislators. These bills (H.R. 365, H.R. 858, H.R. 2067, and H.R. 2605) have been scheduled for a public hearing on June 23, 1981, by the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means.

The first part of this pamphlet contains a summary of present law and the four bills. The second part is a more detailed description of present law and its background; and the third part is an explanation of the provisions of each bill, its effective date, and estimated revenue effect.

I. SUMMARY

Present Law

Under present law, a State legislator may elect to treat the legislative district represented as his or her tax home. If such an election is made, the State legislator is entitled to a deduction for living expenses equal to the sum of the amount determined by multiplying each legislative day of the individual by the amount of the Federal per diem for the location of the legislature. For this purpose, the term "legislative day" includes only days on which the legislator was away from home overnight on specified legislative business.

The provisions of present law apply to taxable years beginning before 1981.

Summary of the Bills

1. *H.R. 365—Mr. Lederer*

The bill would extend the provisions of present law for one year, or to taxable years beginning before 1982.

2. *H.R. 858—Mr. Phillip Burton*

The bill would modify, and make permanent, the provisions of present law. Under the bill's modified rule, an electing legislator would be treated as having expended an amount equal to the sum determined by multiplying each of the legislator's days by the amount allowed as per diem to employees of the legislator's State. The bill also would deem an electing legislator to be away from home, in pursuit of legislative business, on each legislative day.

The bill would apply to taxable years beginning on or after January 1, 1973.

3. *H.R. 2067—Messrs. Traxler, Brodhead, et al.*

The bill would make permanent the provisions of present law.

4. *H.R. 2605—Messrs. Matsui, Rousselot, Gibbons, Stark, et al.*

The bill would modify, and make permanent, the provisions of present law. Under the bill's modified rule, an electing legislator would be treated as having expended an amount equal to the sum determined by multiplying each of the legislator's legislative days by the greater of the Federal per diem or the State per diem (but not in excess of 110 percent of the Federal per diem). The bill also would deem an electing legislator to be away from home, in pursuit of legislative business, on each legislative day.

The bill would apply to taxable years beginning on or after January 1, 1973.

II. PRESENT LAW

In general

Under present law, an individual is allowed a deduction for traveling expenses (including amounts expended for meals and lodging) while away from home overnight in the pursuit of a trade or business (Code sec. 162(a)).¹ These expenses are deductible only if they are reasonable and necessary in the taxpayer's business and directly attributable to it. "Lavish or extravagant" expenses are not allowable deductions. In addition, except as expressly allowed under the Code, no deductions are allowed for personal, living, and family expenses (Code sec. 262). Moreover, deductible "away from home" expenses exclude commuting costs.²

Generally, under Code section 262, expenses and losses attributable to a dwelling unit which is occupied by a taxpayer as his personal residence are not deductible. However, deductions for interest, certain taxes, and casualty losses attributable to a personal residence are expressly allowed under other provisions of the tax laws (Code secs. 163, 164, and 165).

A taxpayer's "home" for purposes of the deduction of traveling expenses generally means his principal place of business or employment. Where a taxpayer has more than one trade or business, or a single trade or business which requires him to spend a substantial amount of time at two or more localities, his "home" is held to be at his principal place of business. A taxpayer's principal place of business is determined on an objective basis taking into account the facts and circumstances in each case. The more important factors to be considered in determining the taxpayer's principal place of business (or tax home) are: (1) the total time ordinarily spent by the taxpayer at each of his business posts, (2) the degree of business activity at each location, (3) the amount of income derived from each location, and (4) other significant contacts of the taxpayer at each location. No one factor is determinative.³

State legislators

Prior to the Tax Reform Act of 1976, there was no special rule for ascertaining the location of a State legislator's tax home. As a result, the generally applicable rules, described previously, determined the location of a State legislator's tax home.

¹ See *U.S. v. Correll*, 389 U.S. 299 (1967).

² Treas. Regs. secs. 1.162-2(e), 1.262-1(b)(5); *Fausner v. Comm'r*, 413 U.S. 838 (1973).

³ See *Montgomery v. Commissioner*, 532 F.2d 1088 (6th Cir. 1976) *aff'd*, 64 T.C. 175 (1975). In *Montgomery*, the Court of Appeals affirmed the Tax Court's finding that a Michigan legislator's tax home was in Lansing, rather than in the Detroit district represented. As a result, the legislator was not "away from home" overnight for purposes of deducting expenses under Code section 162.

The Tax Reform Act of 1976 provided an election for the tax treatment of State legislators for taxable years beginning before January 1, 1976. This was extended for one year by the Tax Reduction and Simplification Act of 1977 to taxable years beginning before January 1, 1977, and was extended further by Public Law 95-258 to taxable years beginning before January 1, 1978. Public Law 96-167, again, extended the State legislator election to taxable years beginning before January 1, 1981. In the absence of further congressional action, the tax home of a State legislator, for taxable years beginning after 1980, must be determined under the general rules described previously.

The election provisions of the 1976 Act applied to all taxable years beginning before January 1, 1976, for which the period of assessing or collecting a deficiency had not expired before the Act's date of enactment.

Under this election, a State legislator may, for any such taxable year, treat his place of residence within his legislative district as his tax home for purposes of computing the deduction for living expenses. If this election is made, the legislator is treated as having expended for living expenses an amount equal to the sum of the daily amount for per diem generally allowed to employees of the U.S. Government for traveling away from home,⁴ multiplied by the number of days during that year that the State legislature was in session, including any day in which the legislature was in recess for a period of four or fewer consecutive days. In addition, if the State legislature was in recess for more than four consecutive days, a State legislator may count each day in which his physical presence was formally recorded at a meeting of a committee of the State legislature. For this purpose, the rate of per diem to be used is to be the rate that was in effect during the period for which the deduction was claimed.

These limitations apply only with respect to living expenses incurred in connection with the trade or business of being a legislator. The 1976 Act did not impose a limitation on living expenses incurred

⁴ Federal per diem allowance rates are established periodically by the Administrator of the General Services Administration. The current maximum per diem rate for temporary duty travel within the United States is \$50. However, the GSA Administrator may prescribe greater maximum rates for particular geographical areas. See 5 U.S.C. sec. 5707. For temporary duty travel to or within a "high rate geographical area," a Federal employee may be reimbursed for the actual and necessary subsistence expenses incurred, but not in excess of the maximum rate prescribed for the geographical area. In other words, the maximum rate merely establishes a ceiling on the amount of actual subsistence expenses which may be reimbursed.

As is the case with per diem allowances generally, the per diem deduction allowed to State legislators does not include any otherwise deductible expense for long distance travel between the district represented and the State capital. Thus, if otherwise qualifying long distance travel expenses were \$800, the per diem amount was \$50, and the legislator was away from home overnight at the legislature for 200 legislative days, the total deduction allowed to the legislator would be \$10,800. This represents \$50 times 200 legislative days (\$10,000) plus \$800 long distance travel. Qualifying long distance travel, as noted in the text above, does not include commuting costs.

Although some States have per diem allowances or reimbursements for some or all State employees, the provisions of section 604 of the Tax Reform Act of 1976 use only the Federal per diem. A comparison of State and Federal per diem rates is contained in the table following.

by a legislator in connection with a trade or business other than that of being a legislator. As to any other trade or business, the ordinary and necessary test of prior law continues to apply.⁵

The State legislator provision of the 1976 Act was construed by the Tax Court in *Eugene A. Chappie v. Commissioner*, 73 T.C. 823 (1980). In that case, the Tax Court held that the generally applicable business deduction rules of the Code (sec. 162) required a California Assemblyman to be away from home overnight in order to be entitled to a business deduction for traveling and living expenses. Because section 604 of the Tax Reform Act of 1976 made no change in this rule for State legislators, the Tax Court held that no such deduction was available as to days when a legislator actually was not away from his tax home (i.e., his place of residence in the district represented) overnight. The Court explained that the present law rules pertaining to business deductions and commuting expenses (Code secs. 162 and 262) precluded a deduction for expenditures incurred in the legislator's travels to and from Sacramento. Because the legislator did not comply with the generally applicable business deduction rules, as modified by section 604 of the Tax Reform Act of 1976, he could not be deemed to have expended the per diem amount allowable to electing State legislators as living expenses under the provision of the 1976 Act.

The following table contains a comparison of amounts allowed as per diem to State legislators by their States and of amounts allowed as per diem to employees of the Federal Government for temporary duty travel at the location of each State's capital.

⁵ See Rev. Rul. 79-16, 1979-1 C.B. 91.

Comparison of Federal and State Per Diem Allowances

| State | State per diem ¹ | Federal per diem ² | State | State per diem ¹ | Federal per diem ² |
|--------|--------------------------------------|-------------------------------|--------|------------------------------------|-------------------------------|
| Ala. | \$65 (105 days) | 50 | Mo. | \$35 | 50 |
| Alas. | \$55 | 83 | Mont. | \$40 | 50 |
| Ariz. | \$40 (140 days) ³ | 50 | Neb. | ----- | 50 |
| Ark. | \$308 (wk) ³ | 50 | Nev. | \$44 | 50 |
| Calif. | \$46 | 62 | N.H. | ----- | 50 |
| Col. | \$10 (\$20 overnight) | 67 | N.J. | ----- | 50 |
| Conn. | ----- | 56 | N.M. | ----- | 50 |
| Del. | ----- | 50 | N.Y. | \$25 (\$40 overnight) ³ | 50 |
| Fla. | \$35 | 50 | N.C. | \$44 | 50 |
| Ga. | \$44 | 56 | N.D. | \$70 | 50 |
| Haw. | \$20 | 70 | Ohio | ----- | 50 |
| | (overnight) | | Okla. | \$35 (4-day wk., overnight) | 50 |
| Ida. | \$25 (\$44 overnight) | 50 | Ore. | \$44 | 50 |
| Ill. | \$36 | 50 | Pa. | \$7,500 (yr.) ³ | 58 |
| Ind. | \$44 | 62 | R.I. | ----- | 50 |
| Iowa | \$30 (120 days odd, 100 even, years) | 50 | S.C. | \$35 ³ | 50 |
| | | | S.D. | \$50 (5-day wk.) | 50 |
| Kan. | \$50 | 50 | Tenn. | \$66.47 (90/105 days) | 50 |
| Ky. | \$75 | 50 | Tex. | \$30 | 50 |
| La. | ----- | 50 | Utah | \$15 | 50 |
| Me. | \$25 (\$12 meals only) ³ | 50 | Vt. | \$17.50 (\$37.50 overnight) | 50 |
| Md. | \$50 (\$20 meals only) ³ | | Va. | \$50 ³ /\$44 | 50 |
| Mass. | \$2-32 ³ | 66 | Wash. | \$44 | 50 |
| Mich. | \$5,200 (yr.) ³ | 50 | W. Va. | \$30 (\$20 meals) ³ | 59 |
| Minn. | \$17 | 61 | Wis. | \$15 (\$30 meals) ³ | 50 |
| Miss. | \$30 | 50 | Wyom. | \$36 | 58 |

¹ Council of State Governments, 23 *The Book of the States* 1980-81, table 7, at 90-91.

² Federal per diem at the respective State capital cities.

³ Vouchered only.

III. DESCRIPTION OF THE BILLS

1. H.R. 365—Mr. Lederer

Explanation of the bill

The bill would extend the provisions of the Tax Reform Act of 1976 relating to the election accorded to State legislators for one additional year, or to taxable years beginning before January 1, 1982.

Effective date

The bill would apply to taxable years beginning before January 1, 1982.

Revenue effect

It is estimated that this bill would reduce budget receipts by \$2 million in fiscal year 1981 and \$3 million in 1982.

2. H.R. 858—Mr. Phillip Burton

Explanation of the bill

The bill would make several changes in, and would make permanent, the provisions of the Tax Reform Act of 1976 which relate to a State legislator's annual election to treat his or her place of residence within the legislative district represented as his or her tax home.

The bill would require an electing legislator to compute the amount deemed to have been expended with regard to the per diem amount generally allowable to employees of the State, rather than of the Federal government, while away from home.¹ The applicable per diem amount for employees of the State of which the taxpayer is a legislator then would be multiplied by the total of the legislator's legislative days in order to arrive at the allowable deduction. For this purpose, the term "legislative days" would have the same meaning as it has under the State legislator provisions of the 1976 Tax Reform Act.

The bill also would deem an electing State legislator to be "away from home" in the pursuit of a trade or business on each legislative day. As a result, an electing legislator would be entitled to a deduction, equal to the State per diem amount, for each legislative day without regard to whether the legislator actually (1) was present at the legislature for that day (or for any day in a legislative recess of four or fewer consecutive days), (2) was away from home overnight, or (3) was formally recorded as present at a meeting of a legislative committee during a recess period. This change, in effect, would reverse the decision in *Chappie v. Commissioner*, 73 T.C. 823 (1980), for open and future tax years.

¹ Since all of the States apparently do not allow per diems to their employees, the Committee may want to consider adopting the Federal per diem for legislators of such States. The table in Part II (Present Law) contains a comparison of amounts allowed as per diem under State and Federal law.

Effective date

The provisions of the bill would apply to taxable years beginning on or after January 1, 1973.

Revenue effect

It is estimated that this bill would reduce budget receipts by \$2 million in fiscal year 1981, \$4 million in 1982, \$4 million in 1983, \$5 million in 1984, \$5 million in 1985, and \$6 million in 1986.

3. H.R. 2067—Messrs. Traxler, Brodhead, et al.***Explanation of the bill***

The bill would make permanent the elective tax treatment of State legislators originally enacted in the Tax Reform Act of 1976.

Effective date

The bill would apply to taxable years beginning after December 31, 1980.

Revenue effect

It is estimated that this bill would reduce budget receipts by \$2 million in fiscal year 1981, \$4 million in 1982, \$4 million in 1983, \$5 million in 1984, \$5 million in 1985, and \$6 million in 1986.

4. H.R. 2605—Messrs. Matsui, Rousselot, Gibbons, Stark, et al.***Explanation of the bill***

The bill would make several changes in, and would make permanent, the provisions of the Tax Reform Act of 1976 which relate to a State legislator's annual election to treat his or her place of residence within the legislative district represented as his or her tax home.

The bill would allow a State legislator to elect, for any taxable year, to treat his residence within the legislative district represented as his "tax home" for purposes of computing the deduction for living expenses allowed under section 162 of the Code. An electing legislator would be treated as having expended for living expenses (incurred in connection with the trade or business of being a legislator) an amount equal to the sum determined by multiplying each of the individual's legislative days during the taxable year by the greater of: (1) the amount generally allowable with respect to such a day to employees of the state of which the individual is a legislator for per diem while away from home, or (2) the amount generally allowable for per diem with respect to such day to employees of the U.S. Government for traveling away from home. In determining which per diem allowance is greater, a State per diem allowance for a day is taken into account only to the extent that it does not exceed 110 percent of the Federal per diem for that day. The bill further provides that an electing legislator is deemed to be away from home in the pursuit of a trade or business on each legislative day.

For purposes of computing the maximum allowable deduction, the term "legislative day" would have the same meaning as under the 1976 Act.

Under the bill, an electing State legislator would be deemed to have expended for business purposes an amount equal to the sum of the appropriate per diem times the legislator's legislative days for the taxable year. In addition, an electing legislator would be deemed to be away from home in the pursuit of a trade or business on each legislative day. As a result, an electing legislator would be entitled to a deduction equal to the sum of that computed under the statutory formula. Because such an individual would be deemed to be away from home in the pursuit of a trade or business while incurring the deemed expenses, such an electing legislator would not be required to be (1) present at the legislature for that day (or for any day in a legislative recess of four or fewer consecutive days), (2) away from home overnight, or (3) formally recorded as present at a meeting of a legislative committee during a recess period. This change, in effect, would reverse the Tax Court decision in *Chappie v. Commissioner*, 73 T.C. 823 (1980), for open and future tax years.

In determining the appropriate rate of per diem to be utilized for the deduction computation, the rate of both Federal and State per diems to be used are those rates which were in effect for the legislative days for which the deduction is claimed.

Effective date

The provisions of the bill would apply to taxable years beginning on or after January 1, 1973.

Revenue effect

It is estimated that this bill would reduce budget receipts by \$2 million in fiscal year 1981, \$5 million in 1982, \$5 million in 1983, \$6 million in 1984, \$6 million in 1985, and \$7 million in 1986.

