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NOTES

COMMISSIONER V. SOLIMAN: A MAN'S HOME MAY BE HIS CASTLE BUT NOT HIS PRINCIPAL PLACE OF BUSINESS

The Internal Revenue Code (I.R.C.) differentiates between business expenses and personal or living expenses. Business expenses are deductible from income while personal expenses are not. These themes clash, however, when business is conducted within the home. Expenses incurred in the upkeep of a taxpayer's residence are for personal and living use, yet some specific expenses may be directly or indirectly attributable to an income-producing business.

Prior to the enactment of the Tax Reform Act of 1976, business expense deductions for the home office were handled within the confines of I.R.C. § 162(a), which allowed a deduction of ordinary and necessary business expenses;[1] I.R.C. § 212, which allowed a deduction of expenses incurred for the production of income;[2] and I.R.C. § 262, which denied deductibility of personal, living or family expenses.[3] Congress could disallow any other deductions it chose to as "a matter of grace."[4] Because distinguishing between business expenses and personal expenses is fairly difficult, the taxpayer might possibly receive an undeserving deduction.

To ease the tensions between § 162 and § 262, Congress enacted §

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[1] I.R.C. § 162(a).

In General. —There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

I.R.C. § 162(a) (1975).

[2] I.R.C. § 212.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year-

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income: or . . .

I.R.C. § 212 (1975).

[3] I.R.C. § 262(a).

General Rule. — Except as otherwise provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

I.R.C. § 262(a) (1975).

[4] Commissioner v. Sullivan, 356 U.S. 27, 28 (1958).

280A as a compromise, which disallowed any deduction for use of a home which is used as a residence.[5] Section 280A(c)(1), however, provided exceptions allowing home office deductions for certain business use. A taxpayer can deduct home office expenses so long as the office is exclusively and regularly used as the principal place of business, to meet clients, customers or patients, or in connection with the taxpayer's business if the office is not attached to the home.[6] Unfortunately, neither the statute nor the caselaw regarding the exceptions has laid to rest the question of home office deductibility in determining taxable income.

There exists a need for clarity between nondeductible personal expenses and specific business expenses with regards to the maintenance of a home office as a result of shifting work patterns in today's economy. The home office may become increasingly popular as an opportunity for one spouse to stay at home with children in two income households. The emergence of an information super highway will provide easier access to business information, thereby enabling the taxpayer to conduct more business at home. The expansion of global markets has made business an around-the-clock venture, no longer forcing the taxpayer to be constricted to those working hours held by the traditional office. This increased emphasis and use of the home office means there is a greater need to reconcile and delineate those functions which enable a home office to obtain a tax deduction.

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[5] I.R.C. § 280A(a).

> General Rule. — Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S 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.

I.R.C. § 280A(a) (1975).

[6] I.R.C. § 280A(c)(1).

> (1) CERTAIN BUSINESS USE.—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—
>
> (A) [as] the principal place of business for any trade or business of the taxpayer,
>
> (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
>
> (C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's 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.

I.R.C. § 280A(c)(1) (1994).

This Note will examine the principal place of business exception contained in § 280A(c). Section one will discuss the "appropriate and helpful" test used by the Tax Court prior to the enactment of § 280A, and the adoption of § 280A to resolve conflicts among the courts and to curb taxpayer abuse. Section two will focus on the "focal point" test as previously applied to determine the principal place of business under § 280A(c)(1). Next, section three reviews the development of the "dominant portion" tests adopted by the Second and Seventh Circuits in response to inequities caused by using the "focal point" test. Section four examines the "facts and circumstances" test used by the Tax Court in *Soliman v. Commissioner*[7] in response to the three appellate court reversals of the "focal point" test. Section five discusses and analyzes the resulting Supreme Court decision and § 280A(c)(1). Section six addresses the reasoning of those Justices who criticized the decision and explores the tests put forth by Justice Thomas in his concurrence and Justice Stevens in his dissent. Finally, section seven considers the implications of, and the regulatory response to, the Supreme Court decision, Tax Court cases, and Revenue Rulings which modify the notion of the principle place of business in accordance with *Soliman*. Further, section seven addresses the newly proposed legislation drafted to counteract the impact of *Soliman*.

I. LEGISLATIVE HISTORY AND THE "APPROPRIATE AND HELPFUL" TEST

Before the enactment of § 280A, Congress had provided little guidance with regard to home office deductions. In order to receive a deduction for the business use of a personal residence, a taxpayer had to establish that such expenses were incurred through carrying on a business (§ 162) or for the production of income (§ 212).[8] The business activity must have been directly connected to the use of the home. Under I.R.C. Regulation § 1.262-1(b)(3), any expenses incurred in maintaining the home were considered nondeductible living expenses, even when a taxpayer inciden-

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[7] 94 T.C. 20 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S.Ct. 701 (1993). The United States Tax Court has applied *Soliman* in both Shore v. Commissioner, T.C. Memo 1990-272 (1990) (applying the "essential to his business," and "no other location available to perform the office functions of the business" tests), and McDonald v. Commissioner, T.C. Memo 1991-54 (1991) (evaluating the "all of the facts and circumstances" test).

[8] S. Rep. No. 938, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3576.

tally conducted business there.[9] This Regulation allowed a business expense deduction for a part of the home only if that part was used as the taxpayer's sole place of business.[10]

The Internal Revenue Service maintained a rigid standard on the deductibility of a home office. Its opinion was that a home office was more closely related to a personal expense under § 262, thereby resulting in it not being deductible. With regard to an office in an employee's home, the I.R.S. took the position that the office must have been both required by the employer as a condition of employment, and regularly used by the employee to perform his or her duties.[11] Any incidental, occasional or voluntary uses of the home for business purposes were not deductible.[12]

The Tax Court traditionally applied a less restrictive standard than the Internal Revenue Service.[13] The court's approach, however, was somewhat inconsistent.[14] Generally, the courts took the position that § 162(a)

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[9] § 1.262-1 provides in part:

(b) Personal, living, and family expenses are illustrated in the following examples:

* * *

(3) Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense.

26 C.F.R. § 1.262-1 (1993).

[10] § 1.262-1, *supra* note 9.

[11] Rev. Rul. 62-180, 1962-2 C.B. 52, 53. 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.

[12] Rev. Rul. 62-180, *supra* note 11.

[13] *See, e.g.*, Newi v. Commissioner, 28 T.C.M. (CCH) 686, 691 (1969), *aff'd*, 432 F.2d 998, 1000 (2d Cir. 1970) (allowing the deduction where the home office was appropriate and helpful to the taxpayer's business, even though it was not required by his employer), and Peiss v. Commissioner, 40 T.C. 78, 84 (1963), *acq.*, 1968-2 C.B. 2 (allowing a home office deduction even though the taxpayer's employer did not require him to maintain the home office).

[14] *Compare* Newi v. Commissioner and Peiss v. Commissioner *with* Sharon v. Commissioner, 66 T.C. 515, 524 (1976), *aff'd*, 591 F.2d 1273, 1274 (9th Cir. 1978), *cert. denied*, 442 U.S. 941

allowed a deduction when the taxpayer's home office expenditure was "ordinary and necessary."[15] The court interpreted "ordinary and necessary" to mean "appropriate and helpful" in *Newi v. Commissioner.*[16] Thus, the applicable test for determining the deductibility of home office expenses was whether, like any other business expense, the maintenance of an office in the home was appropriate and helpful to running the business under all circumstances.[17]

In *Newi v. Commissioner*, the taxpayer, Newi, sold television advertisement time for ABC.[18] He worked out of his home office an average of three hours per night reviewing and preparing work, researching ratings material and viewing advertising spots televised on both ABC and competing networks.[19] He also had an office available to him at the ABC building.[20]

The Tax Court held that the taxpayer's use of his home study was appropriate and helpful to his ability to conduct business, and therefore, the expenses relating to the study were deductible, ordinary and necessary business expenses.[21] The appellate court, citing I.R.C. Regulation § 1.262-1(b)(3) of the 1954 Code, contended that so long as the taxpayer used part of the home as his place of business, the portion of the rent and expenses that could be attributed to that space acting as the place of business was deductible as a business expense.[22] It went on to state that the term "necessary" imposed only the minimal requirement that the contested expenditure be "appropriate and helpful" to the taxpayer's business.[23]

(1979) (where the Tax Court considered all the facts and not the appropriate and helpful standard in denying the home office deduction).

For additional analysis of the positions of different courts on the deductibility of a home office and the tests used leading up to the enactment of § 280A, *see* Bryna Lee Rosen, Note, *The Home Office Deduction Game: Will* Soliman v. Commissioner *Return The Taxpayer To Square One?*, 12 Va. Tax Rev. 141, 144-48 (1992).

[15] *Sharon*, 66 T.C. at 524.

[16] 432 F.2d 998 (2d Cir. 1970).

[17] *See, e.g.*, Meiers v. Commissioner, 782 F.2d 75, 79 (7th Cir. 1986); Bodzin v. Commissioner, 60 T.C. 820 (1973), *rev'd*, 509 F.2d 679 (4th Cir.), *cert. denied*, 423 U.S. 825 (1975).

[18] *Newi*, 432 F.2d at 999.

[19] *Id.*

[20] *Id.* While he did have an office available, it was only available in the evening after regular business hours. *Id.*

[21] Newi v. Commissioner, 28 T.C.M. (CCH) 686, 691 (1969), *aff'd*, 432 F.2d 998 (2d Cir. 1970).

[22] *Newi*, 432 F.2d at 1000.

[23] *Id.*; *see also* Commissioner v. Tellier, 383 U.S. 687, 689 (1966) (*quoting* Welch v.

The problem posed by the "appropriate and helpful" standard was that it enabled taxpayers to attribute personal living and family expenses to the home office as ordinary and necessary business expenses.[24] This could allow them to deduct almost any personal or "minor, incremental expense" that was incurred by, or related to, their business activities.[25] The court determination of which expenses were appropriate and helpful to a business was necessarily a subjective one.[26] Such a determination could result in the abuse of § 162(a) by the conversion of nondeductible personal, living and family expenses into deductible ordinary and necessary business expenses, should such expenses be appropriate and helpful in carrying on business activities within the residence.[27] Congress wanted to prevent this unwarranted deduction of business expenses for what was essentially personal use, and permit a deduction for only legitimate business use of the home.[28] There also was concern that the appropriate and helpful test increased the administrative burden of the taxpayer by requiring him to calculate the amount of time used for business in the use of his personal residence.[29]

Congress, therefore, felt the need to provide more definitive rules regarding home office business deductions in order to resolve conflicts between court decisions and the position of the Internal Revenue Service.[30] It also sought to prevent possible deductions of nondeductible personal, living and family expenses due to minor, incremental business expenses incurred in relation to the maintenance of a business office in the home.[31]

Helvering, 290 U.S. 111, 113 (1933)).

[24] S. Rep. No. 938, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579-3580.

[25] Drucker v. Commissioner, 715 F.2d 67, 69 (2d Cir. 1983) (citing S. Rep. 938, 94th Cong., 2d Sess. 174, *reprinted in* 1976 U.S.C.C.A.N. 3439, 3580).

[26] S. Rep. No. 938, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579-3580.

[27] Baie v. Commissioner, 74 T.C. 105, 110 (1980); S. Rep. No. 938, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579.

[28] Soliman v. Commissioner, 94 T.C. 20, 24 (1990); S. Rep. No. 938, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439.

[29] *Baie*, 74 T.C. at 109; S. Rep. No. 938, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579.

[30] *Compare* Bodzin v. Commissioner, 509 F.2d 679, 681 (4th Cir. 1975) (where the appellate court, in reversing the tax court, did not consider the appropriate and helpful standard in denying the deduction), *cert. denied*, 423 U.S. 825 (1975) with Newi v. Commissioner, 432 F.2d 998, 1000 (2d Cir. 1970) (where the appellate court affirmed the tax court and used the appropriate and helpful standard in allowing the deduction).

[31] *See Baie*, 74 T.C. at 109; *Drucker*, 715 F.2d at 69; S. Rep. No. 938, 94th Cong., 2d Sess. 3

The appropriate and helpful standard made it too easy for taxpayers to assess personal expenses as ordinary and necessary business expenses warranting a deduction. Thus, in response to conflicting results and tensions between § 162 and § 262, Congress enacted § 280A into the Tax Reform Act of 1976 to disallow home office deductions unless one of three narrow exceptions were met.[32] Unfortunately, § 280A did not provide the definitive rules that Congress had intended. The statute itself provided no definition for the taxpayer's principle place of business. Nor was there guidance in the legislative history or the regulations as to what constituted the principle place of business within the context of § 280A. Thus, the new statutory language both required and invited judicial interpretation.

The Tax Court envisioned that Congress had meant to rely on the focal point of the taxpayers activities.[33] Because Congress did not provide more precise language, the Tax Court developed and adopted a "focal point" test to identify a taxpayer's principal place of business.[34]

II. THE PRINCIPAL PLACE OF BUSINESS AND THE FOCAL POINT TEST

The focal point test was defined in *Baie v. Commissioner* as the place where goods or services are provided to customers or clients, or where income is produced.[35] The number of hours spent conducting different ac-

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(1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579.

[32] I.R.C. §280A(c)(1).

> (1)—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—
>
> (A) [as] the principal place of business for any trade or business of the taxpayer,
>
> (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
>
> (C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's 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. *Baie*, 74 T.C. at 105; S. Res. 455, 94th Cong., 2d Sess., 90 Stat. 1520 (1976); S. Con. Rep. No. 1236, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4118, 4144.

[33] *Baie*, 74 T.C. at 109.

[34] *Id.* at 105.

[35] *Id.* at 110; *see* Soliman v. Commissioner, 94 T.C. 20, 25 (1990); Drucker v. Commissioner, 79 T.C. 605, 613 (1982), *rev'd on other grounds*, 715 F.2d 67 (2d Cir. 1983); Meiers v. Commissioner, 782 F.2d 75, 78 (7th Cir. 1986).

tivities in different locations was not considered controlling in the determination of the focal point.[36] Mrs. Baie operated a hot dog stand at which she packaged and distributed food. When she had no room to expand the business, she began to prepare the food in her kitchen but continued to use the kitchen for her personal purposes. She also maintained a room in her home, which she used exclusively for the administration of the business.

The Tax Court denied the deduction where the sale of the taxpayer's product which generated all of the income took place only at the stand.[37] The final packaging of the goods for consumption and ultimate sales occurred on the business premises and not at the taxpayer's residence.[38] Further, the room in the house, used exclusively for the bookkeeping of the business, did not constitute the focal point of the business.[39] Even though she may have spent a good amount of time there performing necessary business tasks, the room produced no income nor was it used to render services to customers.

The Tax Court consistently followed the focal point test as laid out in *Baie* until a number of appellate courts questioned its reliability.[40] Certain occupations, such as teaching and music, were considered distinguishable enough in their need and use of a home office to deserve the deduction even though the office did not qualify as the focal point of the business.[41]

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[36] *See* Green v. Commissioner, 78 T.C. 428, 433 (1982), (where Mr. Green spent a substantial amount of time returning telephone calls in his home office, the Tax Court relied on what types of activities were performed and not the number of hours spent at each location to determine the principal place of business) *rev'd*, 707 F.2d 404 (9th Cir. 1983); Jackson v. Commissioner, 76 T.C. 696, 700 (1981) (although Ms. Jackson, a real estate salesperson, often met with clients at her home office, the Tax Court denied the deduction where her first contact with clients took place elsewhere).

[37] Baie, 74 T.C. at 109.

[38] *Id.* at 110.

[39] *Id.*

[40] *See* Green v. Commissioner, 78 T.C. 428 (1982), *rev'd*, 707 F.2d 404 (9th Cir. 1983); Jackson v. Commissioner, 76 T.C. 696 (1981).

[41] *See, e.g.*, Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983) (where the court, in finding a musician's occupation a rare situation, allowed a deduction for the home office in which he only practiced); Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984) (where the court looked to where the dominant portion of the taxpayer's work was performed in allowing a deduction).

III. EROSION OF THE FOCAL POINT TEST

The focal point test came under attack by both the Second and Seventh Circuits in three cases in which the appellate courts began to shift away from the rigid requirements of defining the focal point as the place where goods or services are provided or income produced.[42] In *Drucker v. Commissioner*,[43] the Tax Court denied a deduction to a musician who was employed at Lincoln Center, but spent the majority of his time practicing in a home studio. Although Lincoln Center required him to practice as a condition of employment, it provided no quiet place in which to do so.

The Second Circuit reversed, noting that in the time, importance and the unusualness factors of the occupation, the musician's practice time at home was the "focal point" of his employment activities, as opposed to Lincoln Center performances.[44] Without the practice, he would not be capable of performing. He spent less than one-half of his working time at Lincoln Center.[45] Because he used the office exclusively for business and on a regular basis, the court allowed the deduction. The *Drucker* court began to undermine the definition of the focal point test by expanding its examination of the principal place of business to include the nature of the taxpayers business activities, the type of space required to conduct such activities and the practical necessity of using a home office to perform those activities.

The Second Circuit followed the *Drucker* decision with *Weissman v. Commissioner*,[46] further solidifying its movement away from the traditional focal point test. Weissman, a college professor, was required by his employer to research and write scholarly works in addition to teaching, meeting with students and grading papers.[47] He regularly spent eighty percent of his time researching and writing exclusively at home.[48] The college made an office available to him on campus. The office, however, was not a safe place in which to leave books or research, nor did it offer

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[42] *See* Meiers v. Commissioner, 782 F.2d 75 (7th Cir. 1986); Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984); Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983).

[43] 79 T.C. 605 (1982), *rev'd on other grounds*, 715 F.2d 67 (2d Cir. 1983).

[44] *Drucker*, 715 F.2d at 69.

[45] *Id.*

[46] 47 T.C.M. (CCH) 520 (1983), *rev'd*, 751 F.2d 512 (2d Cir. 1984).

[47] *Weissman*, 751 F.2d at 514-15.

[48] *Id.*

the privacy which would allow him to read, think or write without interruption.[49] Weissman felt it a practical necessity to work out of his home because of the lack of a private, on-campus office.[50]

The court adopted the home office as the principal place of business by determining where the dominant portion of Professor Weissman's work was performed. It considered the amount of time spent conducting research and writing at the home office, as well as the fact that such activities were a condition of employment.[51] In allowing the deduction, the Appellate Court noted that not only was the home office the place where Professor Weissman did the most work, but the lack of a suitable office on campus made the home office necessary.[52]

Like in *Drucker*, the taxpayer's occupation involved two different but related activities, teaching as opposed to researching and writing. The court was concerned that "the 'focal point' approach create[d] a risk of shifting attention to the place where a taxpayer's work [was] more visible, instead of the place where the dominant portion of his work [was] accomplished."[53] The court backed the decision by pointing out that it espoused a standard similar to those set forth in the Proposed Regulations of § 280A.[54]

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 514; *see also* Michael M. Megaard & Susan L. Megaard, *Supreme Court Narrows Home Office Deductions in Soliman*, 78 J. Tax'n., Mar. 1993, at 132, 133 [hereinafter, Megaard & Megaard].

[52] *Weissman*, 751 F.2d at 514-15.

[53] *Id.*

[54] *Id.* at 515. Section 1.280A-2(b)(3), which addresses the determination of the principal place of business, states:

> When a taxpayer engages in a single trade or business at more than one location, it is necessary to determine the taxpayer's principal place of business for that trade or business in light of all the facts and circumstances. Among the facts and circumstances to be taken into account in making this determination are the following:
>
> (i) The portion of the total income from the business which is attributable to activities at each location;
>
> (ii) The amount of time spent in activities related to that business at each location; and
>
> (iii) The facilities available to the taxpayer at each location for purposes of that business.

Prop. Treas. Reg. § 1.280A-2, 45 Fed. Reg. 52,399 (Aug. 7, 1980) (*as amended*, 48 Fed. Reg. 33,320 (July 21, 1983)).

For example, if an outside salesperson has no office space except at home and spends a substantial amount of time on paperwork at home, the office in the home may qualify as the salesperson's principal place of business.

The court could have just as easily concluded that, because the employers of Drucker and

The Seventh Circuit adopted a similar standard in *Meiers v. Commissioner*.[55] Mrs. Meiers owned and operated a laundromat. Her duties were to draft employee work schedules, collect money from the machines, fill the coin changer, help customers, and perform bookkeeping and managerial chores. She spent only one hour a day at the laundromat and two hours a day at her home office which was set aside exclusively for business use.[56]

The Tax Court denied the deduction under the focal point test. It held that the laundromat was the location where goods were provided to customers and where the income was generated.[57] The Appellate Court disagreed, however, and based its reversal on where the work was predominantly performed. In terms of both the time spent and functions performed, the home office, not the laundromat, was Meiers' principal place of business.[58] The court was concerned that although the focal point test was less subjective and easier to apply, it created too much inequality among taxpayers.[59]

The Court of Appeals for the Seventh Circuit stressed as a major factor the amount of time the taxpayer spent in the home office. Meiers spent two-thirds of her working time in the home office, as opposed to other locations.[60] The court also considered the importance of the business functions conducted at home, the necessity of maintaining an office in the home, and the expenses incurred by the taxpayer to establish a home office.[61]

Weissman required they practice or write, the home office was necessary for the convenience of the employer under § 280A(c)(1). This was not brought up because the court's aim was focused on dismantling the focal point test.

[55] 782 F.2d 75 (7th Cir. 1986).

[56] *Id.* at 76.

[57] *Id.* at 79.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 75; *see Weissman*, 751 F.2d at 516; *Drucker*, 715 F.2d at 69. This is comparative to the 80% and >50% of time spent in the home office by Weissman and Drucker respectively. *Id.*

[61] *Meiers*, 782 F.2d at 79; *see, e.g.*, Green v. Commissioner, 707 F.2d 404, 407 (9th Cir. 1983).

IV. THE FACTS AND CIRCUMSTANCES TEST USED IN SOLIMAN

In response to the three appellate court reversals, the Tax Court finally abandoned the focal point test in *Soliman v. Commissioner*[62] in favor of a new "facts and circumstances" test.[63] Dr. Soliman, an anesthesiologist, spent thirty to thirty-five hours per week treating or dealing with patients. He worked out of three hospitals, none of which supplied him with an office. He used a room in his apartment exclusively as an office. Although Dr. Soliman did not meet with patients there, he spent two to three hours per day in the office contacting patients and doctors, maintaining patient and financial records, performing bookkeeping activities, and reading books and journals to keep his medical education requirements current.[64]

Applying the focal point test, the only place that qualifies for a deduction is the place where Dr. Soliman generates his income and performs his services as an anesthesiologist. Under this criteria, the focal point is the hospital, not the home office.[65] The Tax Court, however, broke down Soliman's occupation into two important functions: 1) to render medical services at the hospitals and 2) to care for the administrative burdens of his practice including bookkeeping, billing, preparation for patients and a continuing medical education.[66] The majority reasoned that both of these functions were equally necessary ingredients of a medical practice, only the second of which required an office.[67] According to the court, "where a taxpayer's occupation requires essential organizational and management activities that are distinct from those that generate income, the place where business is managed can be the principal place of business."[68]

In deciding which location was the principal place of business for his administrative activities, the majority balanced the factors.[69] For instance, although Dr. Soliman spent more time at the hospitals, the court consid-

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[62] 94 T.C. 20 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S.Ct. 701 (1993).

[63] "If the 'principal place of business' exception has meaning independent of the exception for home offices used to meet clients or patients, then the 'focal point' test should give way to an analysis of all the *facts and circumstances*." *Soliman*, 94 T.C. at 25 (emphasis added).

[64] *Id.*

[65] *Id.* at 25.

[66] *Id.* at 26-27.

[67] *Id.*

[68] *Id.* at 25.

[69] *Id.* at 26-29.

ered the dissimilarity between the hospital and home office activities when it examined the amount of time spent at each. Weighing the factors, the majority felt that such a comparison of hours spent in pursuit of each activity could be deceptive since both were essential functions of the business.[70]

Under the circumstances, the court concerned itself only with the fact that Dr. Soliman spent a substantial amount of time at the home office in order to conclude that it was the principal place of business.[71] The majority grounded its decision on an analogy between Dr. Soliman's situation and the example of an outside salesman who required only "a substantial amount of time spent on paperwork at home" to qualify for a deduction.[72]

The new "facts and circumstances" test adopted by the court relied on a number of factors besides the time spent at each location. The court considered the necessity of the home office, whether those activities performed at the office were essential to manage the business, whether the office was suited for those essential business functions and needs, and whether the furniture and equipment were suitable.[73] It weighed heavily the fact that no hospital had made office space available to Dr. Soliman.[74] It further reasoned that the enactment of § 280A was not meant to, nor should it, force a taxpayer into renting office space rather than working out of his or her own home.[75]

The *Soliman* court considered the factually similar case *Pomarantz v. Commissioner*.[76] Pomarantz was a physician specializing in emergency medical care who contracted work to hospitals. He worked about thirty-five hours per week at the hospital; sixty percent of that time was used to treat patients. No private office was available to him but he had use of a work area and lounge. Although he spent about three to five hours per

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[70] *Id.* at 26; *cf.* Weissman v. Commissioner, 751 F.2d 512, 514 (2d Cir. 1984) (where the professor's activities performed at each office were substantially the same, so it was necessary for the court to look to the amount of time spent at each in order to determine that a deduction was warranted for the home office).

[71] *Soliman*, 94 T.C. at 26.

[72] *Id.* at 27; Prop. Income Tax Reg. §1.280A-2(b)(3), 45 Fed. Reg. 52,399 (Aug. 7, 1980) (*as amended*, 48 Fed. Reg. 33,320 (July 21, 1983)).

[73] *Soliman*, 94 T.C. at 27-28.

[74] *Id. But see* Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984) (where professor had office space available to him although it did not provide the privacy or safety he required).

[75] *Soliman*, 94 T.C. at 29.

[76] 52 T.C.M. (CCH) 599 (1986), *aff'd*, 867 F.2d 495 (9th Cir. 1988).

week at a home office in which he kept a library, business records and patient charts, most weeks he spent more time at the hospital and never treated patients at his home.

The Ninth Circuit looked to *Drucker*, *Weissman* and *Meiers* to conclude that using either the "focal point" test or the "facts and circumstances" test, the hospital was the principal place of business.[77] The *Pomarantz* court reasoned that Dr. Pomarantz consistently spent more time in the hospital than at home, his practice was based on treating patients at the hospital, and his income was generated by the treatment of patients at the hospital, not by the reading or writing done at the home office.[78] The ten percent of working time Dr. Pomarantz spent in the home office was not considered substantial enough under the Proposed Regulations to warrant a deduction.[79] Without setting any definitive line, the *Soliman* court distinguished *Pomarantz* by concluding that thirty percent (30%) of a doctor's time spent in the home office, as was the case for Dr. Soliman, was the substantial amount necessary to meet the requirement set by the Proposed Regulations.[80]

The court noted, however, that Dr. Soliman could not take advantage of I.R.C. § 280A(c)(1)(B) to get the deduction. Although he dealt with patients on a regular basis over the phone, he did not meet with them at the home office. The contacts had to include the physical presence of the patient at the office to get the deduction under § 280A(c)(1)(B).[81] This point of contention becomes more pertinent as the Supreme Court decision clouds the boundaries between (c)(1)(A) and (c)(1)(B).[82]

The dissent written by Judge Ruwe cited *Pomarantz* and *Drucker* for

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[77] Pomarantz, 867 F.2d at 497-98; *see also* Drucker v. Commissioner, 715 F.2d 67, 69 (2d Cir. 1983) (allowing a deduction as the principal place of business to a musician who spent the most time performing his most important activity of practicing in his home office); Weissman v. Commissioner, 751 F.2d 512, 514 (2d Cir. 1984) (allowing a deduction to a college professor who accomplished the dominant portion of his work at his home office); Meiers v. Commissioner, 782 F.2d 75, 79 (7th Cir. 1986) (allowing a deduction to a manager of a laundromat who spent the most time performing the most important business activities in the home office).

[78] *Pomarantz*, 867 F.2d at 497-98.

[79] *Soliman*, 94 T.C. at 27.

[80] Prop. Income Tax Reg. §1.280A-2, *supra* note 54 (allowing a deduction to an outside salesperson who performs a substantial amount of paperwork at the home office).

[81] *See* I.R.C. §280A(c)(1)(B); Jackson v. Commissioner, 76 T.C. 696 (1981) (where no deduction was granted because the visits were not made on a regular basis); Green v. Commissioner, 78 T.C. 428 (1982) (where physical presence is necessary at the home office, telephone calls do not fulfill the meeting or dealing requirement of (c)(1)(B)).

[82] *See* Soliman v. Commissioner, 113 S.Ct. 701, 714 (1993); discussion *infra* part VII.

the assertion that there could be only one principal place of business for each enterprise in which a taxpayer is involved.[83] The Supreme Court has determined that "the words of statutes, including revenue acts, should be interpreted where possible in their ordinary, everyday senses."[84] Using its plain meaning, "principal" is defined as "most important, consequential, or influential."[85] There is no exception in § 280A referring to "essential" or "substantial" home office activities.[86] According to those circuits that have rejected the focal point test, the key for purposes of § 280A is "the place where the dominant portion of [one's] work [is] accomplished."[87] The dissent asserted that the majority failed to make a comparative analysis of the noted factors (*i.e.*, the importance of the home office activities compared to those at other locations or the amount of time spent at each location) to determine the specific location where the "dominant portion of work [was] accomplished."[88] In essence, they argued, the majority adapted the focal point test to fit the situation where an enterprise may have a principal place of business for administrative activities as well as one where goods are delivered and income generated.[89]

The dissenters further criticized the majority for apparently overruling the precedent set down in *Drucker* of denying the deduction under these circumstances. Finally, the dissent admonished the majority also for ignoring the tests set down by those appellate courts which eroded the focal point test by stressing the amount of time spent at each location.[90] They argued that the majority's reliance on the salesman example set forth in the Proposed Regulations was erroneous in that a salesman spends most of his time contacting different customers at a variety of locations, whereas, Dr. Soliman consistently practiced in only three hospitals, in one of which he spent the majority of his time.[91] Likewise, the Proposed Regulations

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[83] *Soliman*, 94 T.C. at 34 (Ruwe, J., dissenting); *see* Pomarantz v. Commissioner, 867 F.2d 495, 496 (9th Cir. 1988); Drucker v. Commissioner, 79 T.C. 605, 612 (2d Cir. 1982).

[84] Malat v. Riddell, 383 U.S. 569, 571 (1966) (*quoting* Crane v. Commissioner, 331 U.S. 1, 6 (1947)).

[85] Webster's Third New International Dictionary 1802 (1971).

[86] I.R.C. § 280A(c)(1)(A); *Soliman*, 94 T.C. at 40-41 (Ruwe, J., dissenting).

[87] *Soliman*, 94 T.C. at 34 (Ruwe, J., dissenting); *see* Weissman v. Commissioner, 751 F.2d 512, 514 (2d Cir. 1984); Meiers v. Commissioner, 782 F.2d 75, 78-79 (7th Cir. 1986).

[88] *Soliman*, 94 T.C. at 35 (Ruwe, J., dissenting).

[89] *Id.* at 40.

[90] *Id.* at 35; *see* Drucker v. Commissioner, 715, F.2d 67 (2d Cir. 1983); Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984); Meiers v. Commissioner, 782 F.2d 75 (7th Cir. 1986).

[91] *Soliman*, 94 T.C. at 37 (Ruwe, J., dissenting).

held no value over the appellate courts nor did the Court owe any deference to them.[92]

Making a comparative analysis of each factor, the dissenters argued that the deduction could not pass muster. Although Dr. Soliman's home office functions were necessary, his business was that of an anesthesiologist, the performance of which was the most important task in his business.[93] He spent the dominant portion of his time at the hospitals as an anesthesiologist.[94]

Pomarantz was not distinguishable, as asserted by the majority, because there were certain weeks in which Dr. Pomarantz spent more time attending to his home office functions rather than patients at the hospital.[95] Surely, during these weeks the time spent at the home office did not indicate in any way that Dr. Pomerantz' home office time was insubstantial.[96]

The Fourth Circuit agreed with the Tax Court's adoption of the facts and circumstances test allowing deductions so long as the home office was maintained for "legitimate" purposes, even though the majority of the taxpayer's time may be spent elsewhere.[97]

V. SOLIMAN AND THE SUPREME COURT

The Supreme Court has attempted to resolve the question of home office expense deductions in *Soliman*.[98] The Court flatly rejected the facts and circumstances test adopted by the Tax Court and Fourth Circuit in favor of a comparative analysis test similar to that proposed by the Tax Court dissenters.[99] The Court reasoned that a comparison of the different locations was necessary to discern which location was the principal place in terms of business activities.[100] Such a comparison of the locations is required where the plain meaning of principal is defined as "most impor-

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92 *Soliman*, 94 T.C. at 27-28.

93 *Soliman*, 94 T.C. at 37 (Ruwe, J., dissenting).

94 *Id.*

95 *Id.* at 40; *see* Pomarantz v. Commissioner, 867 F.2d 495, 496 (9th Cir. 1988).

96 *Soliman*, 94 T.C. at 40 (Ruwe, J., dissenting).

97 Soliman v. Commissioner, 935 F.2d 52, 55 (4th Cir. 1991), *aff'g*, 94 T.C. 20 (1990).

98 Commissioner v. Soliman, 113 S. Ct. 701 (1993), *rev'g* 935 F.2d 52 (4th Cir. 1991).

99 *Id.*

100 Megaard and Megaard, *supra* note 51 at 135.

tant, consequential, or influential."[101] Thus, there exists only one principal place of business.

This determination is made by considering two essential elements contained in the facts of each case: 1) the relative importance of the business activities performed at each location; and, 2) the time spent working at each location.[102] This two-pronged test replaces the three factors contained in the proposed regulations that the lower courts used to establish the principal place of business test set forth in *Weissman* and *Soliman*.[103] If the analysis of the two factors produces no principal place of business, then the courts should not strain to find that the home office qualifies for the deduction by default.[104]

To determine the first prong, courts must evaluate, in a case-by-case analysis, the different activities performed at the different locations, considering the essential characteristics of the particular business.[105] This determination should yield a pattern which reveals those activities which are most important.[106] The fact that income is generated or clients are met at a particular location will be afforded great weight as to where the most important work is performed. This recognition of the formal "focal point," however, is not determinative.[107] Likewise, client or patient visits,[108] or the "point of delivery" (*i.e.*, where services are rendered or goods are delivered) are not conclusive, but are significant indicators in many cases.[109]

A showing of "point of delivery" will not in and of itself entitle the home office to a principal place designation, but the Court emphasized that "the place where . . . contact occurs is often an important indicator of the principal place of business," which "is the principal consideration in most cases."[110] The Court considered the hospitals where Dr. Soliman met patients and provided anesthesia services to qualify as his "point of

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101 *Soliman*, 113 S. Ct. at 706.

102 *Id.*

103 *See* Prop. Treas. Reg. § 1.280A-2, *supra* note 54.

104 *Soliman*, 113 S. Ct. at 707.

105 *Id.* at 706.

106 *Id.*

107 *Id.*

108 Visits qualify for a deduction anyway under § 280A(c)(1)(B), regardless of whether the home office is designated as the principal place of business. *See* I.R.C. § 280A (c)(1)(B) (1994).

109 *Soliman*, 113 S. Ct. at 706-07.

110 *Id.* at 707.

delivery," and thus, more important than his administrative activities performed at home.[111]

Where no business location's activities appear more important than those provided at other locations, the Court will look to the second prong it enunciated: the time spent at each location.[112] However, in *Soliman* the Court did not prioritize the two prongs because Dr. Soliman, by spending the obvious majority of his time at the hospitals, failed to satisfy either prong.[113]

Unlike the Tax Court or the Fourth Circuit, the Supreme Court refused to consider the necessity of the home office activities in maintaining the business or the availability of other office space.[114] In the Court's determination of the principle place of business, the necessity of the activities is automatically considered within the evaluation of where the most important functions are performed. Whether other office space is available is irrelevant,[115] unless the taxpayer is an employee maintaining his home office for the convenience of his employer.[116]

VI. CRITICISM AND IMPLICATIONS OF THE MAJORITY DECISION

Justice Thomas, with whom Justice Scalia joined, offered two solutions in his concurrence. Justice Thomas supported the continued use of the "focal point" test as an objective and reliable standard in most cases, also using a subjective test based on the "totality of the circumstances" as an escape hatch.[117]

Thomas argued that, for those cases where the "focal point" test fails to determine a single principal place of business (*i.e.*, where goods and services are produced and income is generated at multiple locations including the home office), the courts should apply the totality of circumstances test, guided by the Supreme Court's two factors.[118] The Court's emphasis on a taxpayer's point of delivery was basically a restatement of

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111 *Id.* at 708.

112 *Id.* at 707; Megaard and Megaard, *supra* note 51 at 135.

113 Megaard and Megaard, *supra* note 51 at 135.

114 *Soliman*, 113 S. Ct. at 707.

115 *Id.*; Megaard and Megaard, *supra* note 51 at 135.

116 *See* I.R.C. § 280A(c)(1) (1994).

117 *Soliman*, 113 S. Ct. at 709 (Thomas, J., concurring).

118 *Id.* at 709-710.

the focal point test. Supplementing this with an examination of the circumstances would produce more consistent results.[119]

Thus, if Soliman spent thirty-five hours at the home office and only ten hours at the hospital on anesthesiology, and the majority's test would yield no clear answer. The "focal point" test still determines that the hospitals are the principal places of business.[120] The advantage in this result is increased predictability for the taxpayer.

In his dissent, Justice Stevens offered an additional standard which would provide more consistent results across the board.[121] He argued that those self-employed taxpayers who maintained a home office as the headquarters of their business, held it out as their principal place of business, and had no other space available to manage their business should qualify for a deduction.[122]

One of the dissent's major concerns was directed at the majority's apparent failure to reconcile the meaning of § 280A with § 162(a), which would allow a deduction of business expenses if Dr. Soliman's office were located anywhere else besides his home. Congress adopted § 280A to stop abuse, not to penalize taxpayers because they did not rent office space or build a separate structure onto their property.[123] Justice Stevens reasoned that the statute would be hard to abuse if self-employed taxpayers were required to satisfy the three conditions already provided for in the tax and appellate court decisions to qualify for the deduction. These conditions are: 1) the home office must be used exclusively for business purposes, 2) it must be used on a regular basis, and 3) one of the three alternative sections set down in § 280A(c)(1) as a place of business must be satisfied.[124]

Finally, the majority's use of the point of delivery element, which is satisfied by a meeting with clients, puts more emphasis on § 280A(c)(1)(B) before a home office can be designated a principal place of business under § 280A(c)(1)(A). This allows the "meeting with clients" requirement to be a factor in the principal place of business requirement.[125] More likely, Congress intended to consider each subsection of §

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119 *Id.* at 709.

120 *Id.* at 711.

121 *Id.* at 711 (Stevens, J., dissenting).

122 *Id.* at 714-15.

123 *Id.* at 711-12.

124 *Id.* at 713; I.R.C. § 280A(c)(1) (1994).

125 *Soliman*, 113 S. Ct. at 714 (Stevens, J., dissenting).

280A separately as to when a taxpayer can qualify for a deduction, so that she may deduct expenses at a location where she does not necessarily meet with clients or maintain an office for the convenience of his employer.[126] Thus, *Soliman* takes the bite out of § 280A(c)(1)(A) in many instances where § 280A(c)(1)(B) is not satisfied.[127]

The implications of the decision may cause more confusion over the deductibility of home office expenses. The Court's standard requires a case-by-case analysis of the factual elements, which may produce inconsistent results.[128] By not specifying how courts should apply the two comparative factors or which factor should be applied first, there is no guidance for courts to follow as to which should be afforded more weight. Another problem exists in comparing those business locations where the most time is spent at the home office, yet the income is generated elsewhere.[129]

The Court offers no solution had Dr. Soliman spent more time at his home office than any of the three hospitals individually or combined, as was the case in *Drucker* and *Weissman*. These cases allowed deductions, prior to *Soliman*, using factors similar to those used in *Soliman* to disallow the deduction.[130] By applying the "relative importance" factor first, similar to *Soliman*, it would appear that musicians and teachers could not deduct the use of a home office.[131] Nor is there any clarity to the Court's ruling if, as in the case of a general contractor, the taxpayer spends the most amount of time and generates income outside of the home office (*i.e.*, by preparing and submitting bids, dealing with clients and coordinating sub-contractors).[132]

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126 *Id.*

127 *Id.*

128 *Id.* at 706.

129 *Id.* at 709; Megaard and Megaard, *supra* note 51 at 136.

130 Megaard and Megaard, *supra* note 51 at 136.

131 *Id.*

132 *Id.*

VII. THE REGULATORY RESPONSE TO SOLIMAN

The I.R.S. has modified proposed regulation § 1.280A-2(b)(3) in response to *Soliman*.[133] To determine the principal place of business, the I.R.S. will use the "relative importance of the activities performed at each location" and the "time spent at each location" factors set forth in *Soliman* to replace the three factors used by the lower courts.[134] Following the structure set forth by Supreme Court, the "relative importance" factor will be applied first. If this yields no definitive principal place of business then "the time spent at each location" factor will be applied.[135] It is possible that after both are applied, the tests may yield no determination at all. Further, the I.R.S. has replaced the outside salesperson example with seven new situations to illustrate how it will apply the *Soliman* factors to determine the principal place of business.[136] They are as follows:

Example 1. An anesthesiologist regularly and exclusively uses her home office to contact patients, surgeons, and hospitals by telephone; to maintain billing records and patient logs; to prepare for treatments and presentations; to satisfy continuing medical education requirements; and to read medical journals and books. She spends approximately ten to fifteen hours a week in her home office and thirty to thirty-five hours per week administering anesthesia and care in three hospitals, none of which provided her with an office.[137]

The essence of her business is to treat patients in hospitals. The home office activities are less important than the services performed in the hospitals. Further, the comparison of the ten to fifteen hours at home versus the thirty to thirty-five hours spent at the hospitals supports the conclusion that her home office is not her principal place of business. Therefore, she cannot deduct expenses for the business use of her home.[138]

Example 2. A salesperson, whose only office is in his house, uses it regularly and exclusively to set up appointments, store product samples,

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[133] *See* Rev. Rul. 94-24, 1994-15 I.R.B. 5; Rev. Proc. 93-12, 1993-8 I.R.B. 46.

The I.R.S. has also modified Publication 587, "Business Use Of Your Home," which reflects *Soliman*. This will provide taxpayers with the notice and opportunity to comply with *Soliman*'s mandates.

[134] Prop. Treas. Reg. § 1.280A-2, *supra* note 54.

[135] Rev. Rul. 94-24, 1994-15 I.R.B. 5.

[136] Rev. Rul. 94-24, 1994 15 I.R.B. 5; Rev. Proc. 93-12, 1993-8 I.R.B. 46.

[137] Rev. Proc. 93-12, 1993-8 I.R.B. 46.

[138] *Id.*

and write orders and other reports for the companies whose products he sells, also cannot deduct expenses for the business use of his home.[139]

His business is selling products to customers at various locations. He regularly visits the customers to explain the available products and to take orders. He makes only a few sales from his home office and spends about thirty hours a week visiting customers and twelve hours a week working at his home office.[140]

His essential business function is to meet with customers at their place of business. The home office activities are less important than the sales activities he performs when visiting customers. Further, the comparison of twelve hours versus thirty hours per week spent visiting customers supports the conclusion that his home office is not his principal place of business. Therefore, he cannot deduct expenses for the business use of his home.[141]

Example 3. A salesperson performs the same activities in his home office as in Example 2, except that he now makes most of his sales to customers by telephone or mail from his home office. He spends an average of thirty hours a week at his home office and twelve hours a week visiting customers to deliver products and occasionally takes orders.

His essential business function is to make telephone or mail contact with customers, primarily from his home office. Actually visiting customers is less important to the business than the sales activities performed from his home office. Further, a comparison of thirty hours versus twelve hours supports the conclusion that the home office is his principal place of business. Therefore, he can deduct expenses for the business use of his home.[142]

Example 4. A self-employed plumber installs and repairs plumbing in customers' homes and offices. The plumber spends about forty hours a week at customer locations and ten hours a week in his home office talking with customers on the telephone, deciding what supplies to order, and reviewing the business books. He also employs an individual full-time in the office to perform administrative services.[143]

The essence of the plumber's business requires him to perform servic-

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139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 Rev. Rul. 94-24, 1994-15 I.R.B. 5.

es and deliver goods at his customers' locations. The activities that he performs at the home office, although essential, are less important and take less time than the service calls to the customers.[144] The fact that the plumber's employee performs administrative activities at the home office doesn't alter the result. Therefore, the plumber's home office is not his principal place of business, and he cannot deduct expenses for the business use of the home.

Example 5. A school teacher maintains a home office for use in class preparation and for grading papers and tests. She also has a small shared office at the school. The teacher spends about twenty-five hours a week at the school and thirty to thirty-five hours of work time a week in the home office.[145]

The activities performed in the home office, although essential and more time consuming, are less important than the teacher's activities at the school.[146] Because the home office is not the teacher's principal place of business, it's not necessary to determine whether she maintains the office for the convenience of her employer. Again, the I.R.S. concludes that the home office is not the principal place of business.

Example 6. An author spends from thirty to thirty-five hours a week writing in her home office. She also spends another ten to fifteen hours a week at other locations conducting research, meeting with her publishers, and attending promotional events.[147]

The essence of the author's business is writing and the outside activities, although essential, are less important and take less time than the writing. In this case, the home office is the author's principal place of business, and she can deduct expenses for the business use of the home.[148]

Example 7. A self-employed retailer orders costume jewelry from wholesalers and sells it at craft shows, on consignment, and through mail orders. He spends about twenty-five hours a week in his home office filling and shipping mail orders, ordering supplies, and keeping the books of the business. The retailer also spends about fifteen hours a week at craft shows and consignment sale locations. He generates a substantial amount

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144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*

of income from each type of sales activity.[149]

Because the most important activities of the business — sales to customers — are performed in more than one location, the principal place of business can't be determined definitively based on a comparison of the relative importance of the activities performed at the home office or at other business locations. Therefore, the time spent "at each business location assumes particular significance."[150] Applying the time test, the retailer's home office is his principal place of business.

These scenarios, using the Court's comparative analysis test, may still result in different outcomes for similarly situated taxpayers. There may be confusion when a situation arises as a hybrid of two or more examples. For instance, the tax question faced by Professor Weissman[151] addresses different activities that separately arise in both example five and six. Because the examples result in opposing determinations, the deductibility of his home office remains unclear.

Weissman spent eighty percent of his time researching and writing, as required by the terms of his employment, at his home office. According to example six, he could take a deduction. He was employed as a professor to teach, however, and he was provided with an office, albeit one unsuitable to his needs. Under *Soliman* there can be only one principal place of business regardless how many different functions are necessary to the business. Applying the relative importance factor, the activities performed at the college and home office are quite different, yet both appear to be essential under the terms of employment.

If this is the case, then the home office must be considered as the principal place of business by applying the time spent test. However, if Professor Weissman was employed to teach first and foremost, then the Service might consider teaching to be the essential activity of his business. The examples at least provide taxpayers with more information with which to work and should enable them to determine the I.R.S.'s position on the deductibility of their home offices with more consistency.

In a recent case following *Soliman*, the Tax Court in *Crawford v. Commissioner*[152] disallowed a deduction to a doctor who sometimes met patients at his home office when follow-up service was required. The Tax

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149 *Id.*

150 *Id.*

151 *See* Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984).

152 65 T.C.M. (CCH) 2540 (1993).

Court, using *Soliman* as its guide, noted that although Dr. Crawford spent thirty-five percent of his time at the home office and, unlike Soliman, sometimes treated patients there, the follow-up work was considered an extension of the hospital treatment.[153] The taxpayer must regularly meet with patients at the home office or the court will find that the home office is not the principal place of business.[154]

Dr. Crawford would still be ineligible for the deduction even if either Justice Thomas' test or Justice Stevens' test as described in *Soliman* were applied. Using the "focal point" test as recommended by Justice Thomas,[155] no deduction would be allowed because the hospital, and not Crawford's home, is considered his principal place of business. The hospital is where he derived all of his income and rendered the majority of his services.[156] Likewise, the court would deny the deduction under the Stevens test[157] because the hospitals made space available to Dr. Crawford to do follow-up work.[158] Further, he did not hold out the home office as his principal place of business.[159]

This places a heavy burden on the taxpayer to prove the regularity of patient visits to the home office. It is fitting that the burden of proof, to show the exclusive and regular use of the home office for business purposes, be placed upon the taxpayer who is taking the deduction.[160] This heavy burden will ensure that deductions will only be taken for legitimate

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[153] *Id.* at 2541-42. The follow-up work was part of the service required by the hospitals under their contract, and Dr. Crawford received no extra payments for work performed at his home office.

[154] *Id.* at 2544-45. The court ruled that it could not determine that the home office was the principal place of business because the record did not show that the work done at the home office was more important than that done at the hospital. Further, § 280A(c)(1)(B) was not met because the record did not demonstrate the regularity of the visits nor how much follow-up work was actually done at the home office.

[155] Justice Thomas defines a taxpayers focal point of business as "the single location where the taxpayer's business income is generated." *Soliman*, 113 S.Ct at 709 (Thomas, J., concurring).

[156] *Id.*

[157] Justice Stevens focuses on an appropriate and helpful standard where the expenses incurred in maintaining a home office by an employee are a condition of employment and regularly used for the performance of the employees duties. *Id.* at 713 n.8 (Stevens, J., dissenting).

[158] *Crawford*, 65 T.C.M. at 2542.

[159] *Id.* at 2545.

[160] *Id.* (ruling no deduction where the record does not show the amount of time spent at home conducting follow-up work). *See also* Coutsoubelis v. Commissioner, 66 T.C.M. (CCH) 934 (1993). The court ruled that the taxpayer's most important work as a painter was done at the gas stations where he painted and not at home preparing bids and contacting workers and customers by telephone. Further, the taxpayer did not establish the amount of time spent at the home office, so the court denied the deduction.

home offices, preventing the abuses that have concerned Congress.

Two legislative bills have been introduced in reaction to *Soliman* in an attempt to redefine the meaning of principal place of business under § 280A(c)(1). Senators Hatch and Burns have each sponsored legislation to amend § 280A(c)(1).

The Hatch bill[161] attempts to clarify the deductibility of the home office. It amends subsection (c) to include a home office as the principal place of business if: 1) the office is the location where the taxpayer's essential administrative or management activities are conducted on a regular and systematic (and not incidental) basis by the taxpayer, and 2) the office is necessary because the taxpayer has no other location for the performance of the administrative or management activities of the business.[162]

The reasoning behind the Hatch bill is that *Soliman* penalizes small business owners who find it more economical to work out of their homes than paying rent somewhere else. The Senator argues that *Soliman* requires business owners to physically meet clients or customers at the home office and that the revenue of the business must actually be earned in the home office.[163] This argument is representative of the fact that the Supreme Court, although it has abandoned the focal point test in favor of a comparative analysis, has not clarified the confusion over which factors the taxpayer must meet to get the deduction. It depicts how the Court has allowed the § 280A(c)(1)(B) meeting requirement to determine the principal place of business, thus over-shadowing § 280A(c)(1)(A)'s purpose. The Hatch bill favors the Tax Court's "facts and circumstances" assessment of *Soliman* by breaking a business into two distinct functions. The bill takes a very pro-taxpayer slant because the only factor to consider is the availability of another location for administrative activities. It may open the door for the abuse which § 280A was enacted to prevent.

The bill also begs the question of what makes another location available.[164] The Hatch bill only addresses administrative and management activities performed at the home office. It does not establish what factors to consider if such activities are not managerial as in *Weissman* and

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161 S. 1924, 103rd Cong., 2nd Sess. (1994).

162 *Id.*

163 140 Cong. Rec. S2810-11 (daily ed. March 10, 1994) (statement of Sen. Hatch).

164 *Cf.* Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984) (finding that although the college provided Professor Weissman with an office, its lack of safety and privacy made it practically unavailable for his specific needs).

Drucker.[165] It is unclear whether *Soliman* still controls in these situations.

Senator Burns' bill[166] cites four new factors that would allow a taxpayer to take a deduction. Under the Burns bill, a home office, used exclusively and on a regular basis, is the principal place of business if: 1) management or administrative activities are essential to the trade or business of the taxpayer, 2) the only available office for such activities is in the dwelling unit of the taxpayer, 3) such office is essential to such trade or business, and 4) the taxpayer spends a substantial amount of time in the office.[167]

Like the Hatch bill, the Burns bill champions the Tax Court's decision. It follows the original salesman example in the proposed regulations by additionally requiring that a substantial amount of time be spent in the home office. This additional requirement, however, probably will not alleviate confusion because the courts will still be responsible for deciding what amounts to a "substantial amount of time," and the courts have yet to set a definitive line for taxpayers to follow.[168]

Such laws are significant as they shift the presumption of a deduction to the taxpayer. It is clear that more taxpayers would qualify for home office deductions, but neither bill does much to lift the confusion that the Supreme Court allegedly resolved in *Soliman*.

VIII. CONCLUSION

A taxpayer can spend the significant portion of business hours, interact with clients and perform the most important business tasks at the home office, thereby qualifying for a home office deduction pursuant to § 280A(c)(1)(B). Determination of qualification for a home office deduction, however, is applied on a case-by-case basis, and therefore, does not provide a taxpayer with a "bright line" rule to follow.

As such, the Thomas test provides an equitable solution or alternative

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[165] In *Drucker*, the court held that the musicians' "principal place[s] of business" were their home practice studios, and that the rent, electricity and maintenance costs allocated to these practice areas were deductible. Drucker v. Commissioner, 715 F.2d 67, 68-69 (2d Cir. 1983).

[166] S. 1116, 103rd Cong., 1st Sess. (1993).

[167] *Id.*

[168] *Compare* Soliman v. Commissioner, 94 T.C. 20 (1990), *aff'd* 935 F.2d 52 (4th Cir. 1991) (holding that thirty percent of working time spent in the home office is substantial) *with* Pomarantz v. Commissioner, 52 T.C.M. (CCH) 599 (1986), *aff'd* 867 F.2d 495 (9th Cir. 1988) (holding that ten percent of working time spent in the home office was not substantial).

when it is difficult to determine the principal place of business under the focal point test. The focal point test, despite its inequities, is easier to apply than other tests, and it provides the predictability desired in tax planning.

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