

EXPENSES INCURRED IN SEEKING EMPLOYMENT—THE TAX COURT OPENS THE DOOR TO DEDUCTIBILITY

I. INTRODUCTION

This note presents an analysis of recent Tax Court decisions concerning expenses incurred in seeking employment. These expenses have typically consisted of travel, resumé, legal, advertising, cover letters and telephone answering service costs.¹ Individual taxpayers attempting to deduct these costs have relied upon § 162 and § 212 (or their predecessors) of the 1954 Internal Revenue Code.² Previous Tax Court and Service treatment of these expenses has caused taxpayers and commentators difficulty for over fifty years.³ Although the Service has taken the official position that such costs are not deductible,⁴ an analysis of past litigation and Service rulings reveals conflicting rationales in support of this position. This conflict has been obscured by various attempts to distinguish expenses of *seeking* employment from those of *securing* employment.⁵ An historical narrative will demonstrate that,

1. E.g., Mort L. Bixler, 5 B.T.A. 1181 (1927) (travel expenses); Leon Chooluck, 23 P-H Tax Ct. 811 (1954) (travel expenses); Raymond L. Collier, 23 P-H Tax Ct. Mem. 804 (1954) (travel resumé, employment fees); Albert A. Loden, 25 P-H Tax Ct. Mem. 115 (1956) (travel expenses); Thomas W. Ryan, 28 P-H Tax Ct. Mem. 506 (1959) (legal, advertising and employment agency fees); Francois Louis, 35 P-H Tax Ct. Mem. 1174 (1966) (employment agency fees and telephone answering service fees); Eugene A. Carter, 51 T.C. 932 (1969) (employment agency fees); Morris v. Comm., 423 F.2d 611 (9th Cir. 1970) (employment agency fees).

2. INT. REV. CODE of 1954, § 162: TRADE OR BUSINESS EXPENSES. "(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, . . ."; INT. REV. CODE of 1954, § 212: EXPENSES FOR PRODUCTION OF INCOME. "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

(3) in connection with the determination, collection or refund of any tax."

3. See Bittker, *The Individual as Wage Earner*, 11 N.Y.U. INST. ON FED. TAX 1147, 1166-67 (1953); Fleisher, *IRS About-face on Employment Fees Shows Shaky Basis for Taxing Similar Items*, 13 J. TAX. 82 (1960); Nahstall, *Non-Trade and Non-Business Expense Deduction*, 46 MICH. L. REV. 1015, 1028 n. 51 (1948). Another area of tax law related to this subject which has received similar treatment is investigation costs, see Note, *Investigation Cost: An Analysis and a Proposal*, 41 TEMP. L.Q. 81 (1967); Fleischer, *The Tax Treatment of Expenses Incurred in Investigating for a Business or Capital Investment*, 14 TAX L. REV. 567 (1959).

4. I.T. 1397, I-2 CUM. BULL. 145 (1922).

5. Thomas W. Ryan, 28 P-H Tax Ct. Mem. 506 (1959); Eugene A. Carter, 51 T.C. 932 (1969);

although the Service maintained the position that expenses incurred in seeking employment were personal, the Tax Court relied on the absence of a trade or business in denying the deduction. Because of the limited definition afforded “trade or business”, however, these conflicting rationales achieved the same result. Recently the Tax Court has adopted a much more liberal view as to what constitutes a trade or business and in so doing has placed these conflicting rationales in juxtaposition. The result of this conflict will be analyzed in relation to pertinent code sections and applied to hypothetical fact patterns for an insight into future significance.

II. HISTORICAL DEVELOPMENT

The Service’s first official statement on employment costs was an Office Decision published in 1920: “Fees paid to *secure* employment are considered allowable deductions for the purpose of computing net income subject to tax.” (Emphasis added)⁶ This decision was followed two years later by a ruling on travel expenses incurred in seeking employment: “Amounts expended by a taxpayer in *seeking* a position are held to be personal expenses and are not deductible from gross income.” (Emphasis added)⁷

These two decisions established a distinction between “seeking” and “securing” employment; a distinction which was subsequently blurred by the decision in *Mort L. Bixler*.⁸

In *Bixler*, the petitioner organized and managed state fairs which required traveling to various states to secure contracts for his services. In denying the deductibility of expenses incurred in these travels, the court equated securing with seeking when it stated:

When he was not so employed he was carrying on no trade or business A considerable portion of the expenses claimed were incurred by the petitioner *securing* employment . . . and we think amounts expended in *seeking* employment . . . are not deductible. (Emphasis added)⁹

Later cases followed the *Bixler* rationale in denying similar attempts to deduct expenses for seeking employment. In *Leon Chooluck* the petitioner worked in various independent motion picture productions.¹⁰

David J. Primuth, 54 T.C. 374, 380-82 (1970) (Commissioner’s argument and J. Tannerwald’s concurring opinion). See discussion of Francois Louis, 35 P-H Tax Ct. Mem. 1174 (1966) p. 474 *infra*.

6. O.D. 579, 3 CUM. BULL. 130 (1920).

7. I.T. 1397, I-2 CUM. BULL. 145 (1922).

8. 5 B.T.A. 1181 (1927).

9. *Id.* at 1184.

10. 23 P-H Tax Ct. Mem. 811 (1954).

He attempted to deduct the travel expenses incurred in seeking employment. The Tax Court, denying the deduction, responded as in *Bixler* that there was no evidence that the petitioner was employed as an independent contractor and he was not, therefore, carrying on a trade or business.¹¹

Although the code allowed deductions for travel expenses incurred in pursuit of a trade or business,¹² the Tax Court in *Chooluck* drew a distinction between seeking employment and pursuing a trade or business, citing the case of *Morton L. Frank*.¹³ In *Frank*, although expenses incurred in seeking employment were not at issue, the Tax Court defined the term "in pursuit of a trade or business" by saying: "pursuit" . . . is not used in the sense of 'searching for' or 'following after', but in the sense of 'in connection with' or 'in the course of' a trade or business. It [pursuit] presupposes an existing business"¹⁴

In *Raymond L. Collier* (again using *Frank*), the Tax Court disallowed expenses incurred by an unemployed executive.¹⁵ In *Collier*, the petitioner lost his job because of illness and retained an employment agency to obtain a new position. In disallowing the deduction, the Tax Court stated: "[p]etitioner was carrying on no trade or business when the expenditures were made . . . [h]e was seeking employment."¹⁶

The following year the Tax Court was confronted in *William Galindos* with an ingenious argument to the same question.¹⁷ The petitioner had been employed five months in 1952 and four months in 1953. Attempting to deduct expenses incurred in seeking employment, he argued that because he was over 35 he had more difficulty obtaining employment than younger men equally qualified. Consequently, the expenses he incurred should be considered differently from those expenses incurred by a person who can readily obtain employment. The Tax Court, concluding the petitioner's age to be immaterial, stated that

11. *Id.* at 812.

12. INT. REV. CODE of 1954, § 162(a)(2).

13. 20 T.C. 511 (1953).

14. *Id.* at 513-14. In *Frank* the petitioner, following his discharge from the service, worked as an employee of a newspaper. He traveled extensively investigating several publishing businesses he was interested in acquiring. The court denied his deductions for travel expenses under § 23 of the 1939 Code (the predecessor of § 162) by using the reasoning stated in the text. The court denied a similar attempt by a petitioner to deduct travel expenses incurred to secure employment in *Albert A. Loden*, 25 P-H Tax Ct. Mem. 115 (1956) and *Tenney v. Osburn*, 27 P-H Tax Ct. Mem. 267 (1958).

15. 23 P-H Tax Ct. Mem. 804 (1954).

16. *Id.* at 805.

17. 24 P-H Tax Ct. Mem. 252 (1955).

the expenses were incurred while unemployed and incident to seeking employment and hence (citing *Frank*) not deductible.¹⁸

The distinction between seeking and securing employment was revived in *Thomas v. Ryan*.¹⁹ The petitioner was employed from 1944-1953 by Basic Refractories. In 1953 he resigned and obtained employment with Alton Brick. In obtaining employment with Alton Brick, the petitioner paid a law firm \$600 for services and advertising and a \$250 retaining fee to an employment *firm*. A condition in the employment firm contract required the final fee to be paid only if he accepted new employment as a result of the firm's endeavors. Attempting to deduct his expenses under O.D. 579, he argued that the Tax Court should not distinguish between amounts paid to *regular employment agencies* and amounts paid to *others who perform the same function*. The Tax Court, failing to specifically answer the claim under O.D. 579, stated there was no evidence that the employment firm obtained a new position for the petitioner. Moreover, the Tax Court, citing *Frank*, argued that it was well established that expenses incurred while seeking employment were non-deductible. The Tax Court closed saying, “. . . whether any such distinction [between seeking and securing] would be valid, we find it unnecessary here to decide.”²⁰

With the question of “seeking” as opposed to “securing” once again revived, the Service issued a ruling in 1960 which reaffirmed its initial position.²¹ The Service stated that expenses incurred in seeking a position were *personal* and not deductible and that O.D.579 (allowing deductions for fees paid to *secure* employment) was revoked.²² Explaining its position, the Service stated that although employment agency fees are generally paid after employment has been secured, the obligation to pay such fees is incurred when the individual is seeking employment. Therefore, it held: “. . . expenditures incurred by an individual in seeking employment, including fees paid to an employment agency, are not allowable deductions for Federal income tax purposes.”²³

The Service seemed to reiterate that although previous cases had held expenses of seeking employment non-deductible because of the non-

18. *Id.* at 253.

19. 28 P-H Tax Ct. Mem. 506 (1959).

20. *Id.* at 509. The court found no evidence that the final placement fee was paid and from this concluded the fees were paid for seeking rather than securing employment.

21. Rev. Rul. 158, 1960-1 CUM. BULL. 140.

22. *Id.* at 141.

23. *Id.* This seemed to be an attempt to undercut the rationale that since the fees were paid after the new employment commenced, they were paid in an existing trade or business.

existence of a trade or business (for § 162 purposes) or of an existing interest (for § 212 purposes), the official position was that these expenses, regardless of their relationship to the existing trade or business, were personal and therefore non-deductible.

This statement by the Commissioner should have settled the question the *Ryan* court found unnecessary to decide.²⁴ But six weeks later the Service, reacting to the outcry from taxpayers,²⁵ revoked the above ruling and issued Revenue Ruling 60-223 which held:

Revenue Ruling 60-158 . . . which holds that expenses incurred in seeking employment, including fees paid to an employment agency, are not deductible . . . is revoked The Internal Revenue Service will continue to allow deductions for fees paid to employment agencies for securing employment.²⁶

The effect of this ruling was to reinstate: (1) O.D. 579 (which allowed any fees paid to secure employment to be deducted)²⁷ and (2) the Tax Court's rationale that since fees were paid after employment was secured they were "paid or incurred in a trade or business". An implicit consequence of this decision is that, if an existing trade or business can be found, the personal nature of the expense will not render it non-deductible. This result conflicts with the premise that § 262 [personal expenses] is in fact a limiter on § 162 and § 212, but is borne out by court treatment of cases following the issuance of Revenue Ruling 60-223.²⁸

24. See note 17 *supra* and accompanying text.

25. 4 TAX COORDINATOR (R.I.A.) § L, ¶ 4102 (1967).

26. Rev. Rul. 223, 1960-1 CUM. BULL. 57.

27. T.I.R. 231; INDEX CCH 1970 STAND. FED. TAX REP. ¶ 7386. *Cf. Caruso v. United States*, 236 F. Supp. 88, 91 n.4 (D. N.J. 1964).

28. Treas. Reg. § 1.262-1 Personal, living, and family expenses—

(a) *In General.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in Chapter 1 of the Code, for personal, living, and family expenses.

* * *

(c) Cross references. .

Certain items of a personal, living, or family nature are deductible to the extent expressly provided under the following sections, and the regulations under those sections:

- (1) Section 163 (interests)
- (2) Section 164 (taxes)
- (3) Section 165 (losses)
- (4) Section 166 (bad debts)
- (5) Section 170 (charitable, etc., contributions and gifts)
- (6) Section 213 (medical, dental, etc., expenses)
- (7) Section 214 (expenses for care of certain dependents)

In *Riddle v. United States*, the petitioner was an engineer employed by the Air Force.²⁹ During this employment he was approached by a representative of an engineering firm to do consulting work on a part-time basis. The petitioner accepted the offer, set up an office in his home and later unsuccessfully looked for more consulting work. The district court, upholding his attempt to deduct travel expenses and 12% of his home maintenance expenses, found the petitioner was in the trade or business of being a consulting engineer and, therefore, the expenses were deductible.³⁰

Two years later, another district court reacted similarly in *Caruso v. United States*.³¹ In *Caruso*, the petitioner, a veteran, passed the Civil Service Examination for Assistant Building Inspector, which for all practical purposes guaranteed his appointment. Prior to appointment, however, his name was removed from the register. In an effort to be reinstated, petitioner retained an attorney and through the attorney's efforts the petitioner's name was subsequently placed back on the register, resulting in his appointment to the position. The district court, upholding the petitioner's deductions of attorney's fees, held that, although the petitioner had no job, he had a status and "[t]he federal government is willing to encourage any expenses necessary to maintain an existing income-producing activity. It does not, however, intend to allow deductions for every potential income producing activity. In the first case, the government is in effect looking after its own income interest; in the latter, it would be absorbing the costs of mere speculation."³² In reaching this result the court agreed with the Service rulings concerning seeking employment, but found that in this case petitioner already had an interest to protect.³³

(8) Section 215 (alimony, etc., payments)

(9) Section 216 (amounts representing taxes and interest paid to cooperative housing corporation)

(10) Section 217 (moving expenses).

29. 205 F. Supp. 357 (D. Colo. 1962).

30. Note the importance of the expenses having been incurred after his being approached by a third party. Since he had already done some consulting work, the court could easily find he was established in the trade or business of being a consulting engineer. If, however, the same expenses had been incurred without his having been approached by a third party, the result would have been different.

31. 236 F. Supp. 88 (D. N.J. 1964).

32. *Id.* at 92.

33. Treas. Reg. § 1-212-1 (f) (1957) ("expenses incurred in seeking employment are non-deductible under § 212"). It is important to note in this case, however, that there was also a strong governmental policy involved which may have affected the decision. The court stated that to assure

Francois Louis, two years later, provides a vivid example of the potential inconsistencies produced by the varying rationales used by the Service and the courts.³⁴ The petitioner, an engineer, was unemployed from October 1961 to March of 1962. In February of 1962 he entered into a service contract with National Executive Search Inc., an employment agency, paying an initial fee of \$450 and agreeing to later pay National Executive 10% of his first year's salary if they secured a position for him. The petitioner also subscribed to a telephone answering service to receive calls from prospective employers to whom he had sent resumé's. He obtained employment in March of 1962 through his individual efforts and attempted to deduct the fee paid to the employment agency and other costs, including the cost of the telephone answering service.

The Tax Court, in denying the deduction, held:

1. It was well established that expenses of seeking employment were non-deductible (citing *Frank*) and since there was no evidence of his being in business for himself as a professional engineer the deductions were not allowable under § 162;

2. The deductions were not allowable under § 212 for the same reasons set down in *Ryan*; and

3. The expenses were not allowable under Revenue Ruling 60-223 because the employment agency did not get the petitioner his job, once again saying it was *unnecessary to consider the correctness of the distinction between seeking and securing*.

Thus, the Tax Court not only refused to allow deductions for fees paid to an employment agency for *seeking* employment, but also denied fees paid to the telephone answering service for *securing* employment, since not paid to an employment agency.³⁵

In *Eugene A. Carter*, the Tax Court three years later reiterated the distinction between "seeking" and "securing".³⁶ The petitioner, an Air Force officer, deducted fees paid to an employment agency even though he obtained his new employment ultimately as a result of his own efforts.

effectuation of a strong policy in favor of Civil Service, Caruso's primary eligibility must be considered near-equivalent of actual employment. To rule otherwise would defeat strong policies concerning Civil Service. 236 F. Supp. at 92-93.

34. 35 P-H Tax Ct. Mem. 1174 (1966).

35. Note that O.D. 579, note 5 *supra*, which was reinstated by Rev. Rul. 60-223 does not mention the necessity of the fees being paid to an employment agency.

36. 51 T.C. 932 (1969).

The Tax Court, in denying his deduction, said Revenue Ruling 60-223 allowed fees paid for *securing* not *seeking* employment. The distinction can be justified by applying the expenses to the new employment therefore making them incident to a trade or business.³⁷

This perfunctory test was adopted a year later by the ninth circuit in affirming the 1967 Tax Court opinion in *Carson J. Morris*.³⁸ Petitioner, a vice president of an advertising firm, contracted with an employment firm to secure new employment on a non-contingent fee basis. He subsequently obtained employment with a Packing Company through his own efforts, and attempted to deduct the fees paid to the employment firm. The court of appeals, in rejecting the petitioner's argument,³⁹ stated the distinction to be between expenses in seeking and preparing for new work and securing and performing such work.⁴⁰

With this case the judicial position seemed to revert to the original distinction established fifty years earlier in O.D. 579 and I.T. 1397.⁴¹ From the original ruling that expenses incurred in seeking employment were personal and therefore non-deductible,⁴² there developed a line of cases denying the deductions because the expenses were not incident to any existing trade or business or any existing interest. This was followed by the Service's attempt to reestablish its original position in Revenue Ruling 60-158 only to withdraw it in Revenue Ruling 60-223. What has followed has been a return to the existing trade or business investigation and ultimately an automatic application of the "securing" as opposed to "seeking" test.

It is within this framework that we look at the Tax Court's treatment of *David J. Primuth*.⁴³

37 *Id.* at 935.

38 *Morris v. Comm.*, 423 F.2d 611 (9th Cir. 1970), *aff'g* *Carson J. Morris*, 36 P-H Tax Ct. Mem 1424 (1967).

39 "It is axiomatic that without gainful employment it is usually impossible to legally at least produce or collect income. If, as in the petitioner's case, there are expenses incurred in seeking that employment surely that expense qualifies as 'necessary' both within the letter and the spirit of the law " *Id.* at 612 (quoting from petitioner's brief).

40. It is interesting to note that the tax court's opinion which applied the "secure" or "seek" test was written (and unreviewed) by a judge who had retired in 1955 and had been recalled to perform judicial duties under § 7447 of the Internal Revenue Code of 1954. Although the judge was very eminent, it is possible his view may not have been in keeping with the present court's position. This is especially true since two new members have been added to the court since then and one of these new members wrote the majority opinion in the leading case which liberalized the court's position, *David J. Primuth*, 54 T.C. 374 (1970).

41. See notes 6 & 7 *supra*.

42. See note 7 *supra*.

43. 54 T.C. 374 (1970).

In *Primuth*, the petitioner was employed by Foundry Allied Industries as Secretary-Treasurer with responsibility for the financial well being of the corporation, as well as overall management responsibility for cost accounting, purchasing and international finance. Petitioner became dissatisfied with his prospects for advancement, and in response to an advertisement in the Wall Street Journal contacted Fredrick Chusid Co. for the sole purpose of securing new employment. Chusid, although not licensed as an employment agency in its home state of Illinois, described itself as the "world's largest Consultants in Executive Search and Career Advancement."

The petitioner was contacted by a Chusid representative and signed a contract under which he agreed to pay, irrespective of whether new employment was obtained, \$2,775 or \$2,636 if the fee was paid within three weeks, plus certain out-of-pocket expenses in return for Chusid's services. Chusid agreed to provide "consulting service and direct assistance" for a period of 8 months.

As a result of Chusid's efforts, petitioner interviewed with at least seven representatives of various companies and these interviews resulted in four offers of employment. One of the offers was from Symon Manufacturing Co. with which the petitioner accepted employment as Secretary-Controller three days after he terminated his previous employment.

Petitioner deducted both the fee paid to Chusid and the out-of-pocket expenses as an "Employment Agency Fee" on his federal income tax return for the taxable year ending December 31, 1966. The Internal Revenue Service disallowed the deduction stating:

The fee of \$3,016.43 paid to Fredrick Chusid Company is determined to be an expenditure for the purpose of seeking employment which is not deductible under Section 162 or Section 212 of the Internal Revenue Code, but constitutes a non-deductible personal expense under Section 262.⁴⁴

The Commissioner argued that the fees paid to Chusid were not deductible on two grounds:

1. Chusid was not an employment agency registered under Illinois law,⁴⁵ and

44. *Id.* at 377.

45. Although the Commissioner's argument seems irrelevant and was so treated by the Court, there is a policy reason which supports the Commissioner's position. Chusid's home office is in Chicago, Illinois. The Illinois statute governing employment agencies contains specific provisions

2. The fee was not contingent upon the securing of a position. Consequently the fee was for seeking rather than securing employment.⁴⁶

The Tax Court held that the expenditures incurred by the petitioner in securing new employment were deductible under § 162 of the Internal

which regulate the fees and activities of such organizations. Since Chusid had refused to register, the Commissioner was in effect arguing that an allowance of the deduction would sanction Chusid's avoidance of state law.

The statutes provide [ILL. ANN. STAT. ch. 48, §§ 197a-197o. (Smith-Hurd Supp. 1970)]:

Section 197a.

197a Licenses-Fees-Application-Schedule of fees and charges.

* * * No person shall open, keep or carry on any employment agency in the State of Illinois, unless such person shall procure a license therefore from the Department of Labor.

* * *

Section 197d.

197d. Employment counsellors-licensing. It shall be unlawful for any person to act as an employment counsellor, or to advertise, or assume to act as an employment counsellor, without first obtaining a license as such employment counsellor, from the Department of Labor.* * *

Section 197e.

197e. Registration fees and other special fees-Sending applicants when position not open-Receipts-Refunds-Referral slips-Disputes-Posting law-Monthly statements.] §5.

* * * When a permit is granted, such licensed person may charge a registration fee not to exceed two dollars.* * *

* * *

No such licensee shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or to any postal card service, or advertisement, or exact any other fees, compensation or reward, (except that in the case of applicants for positions paying salaries of 5000 dollars or more per annum, where the agency has secured from the Department of Labor a permit to furnish a letter service in accordance with regulations of the department governing the furnishing of such service, a special fee not to exceed 100 dollars, to be credited on the fee charged for any placement resulting from such letter service, may be changed for furnishing such letter service) other than the aforesaid registration fee and a further fee, called a placement fee, the amount of which shall be agreed upon between such applicant and such licensee to be payable at such time as may be agreed upon in writing; *but the placement fee aforesaid shall not be received by such licensee before the applicant has been tendered a position by such licensee. In the event the position so tendered is not accepted by or given to such applicant, said licensee shall refund all fees paid other than the registration fee and special fee aforesaid, within 3 days of demand therefor.* * * * (Emphasis added)

Section 197k.

197k. Terms defined. When used in this Act, unless the context indicates otherwise:

The term 'employment agency' means any person engaged for gain or profit in the business of securing or attempting to secure employment for persons seeking employment or employees for employers.* * *

46. The Illinois statute, *id.*, places a one hundred dollar limit on the registration fee and requires that the payment of all other fees be contingent upon the agency's placement of the individual. Again the Commissioner's argument seems directed at Chusid's refusal to comply with Illinois law.

Revenue Code because the expenses were “incurred by the petitioner in carrying on his trade or business of being a corporate executive.”⁴⁷

In reaching this result the majority of the Tax Court cited previous cases which held that a taxpayer may be in the trade or business of being an employee and since the petitioner in this case was engaged in the trade or business of being a corporate executive, the court argued that “[I]t is difficult to think of a purer business expense than one incurred to permit such an individual to continue to carry on that very trade or business—albeit with a different corporate employer.”⁴⁸ Nor, the court argued, were the expenses personal, because no position requiring greater or different qualifications was required and the expenditure did not result in the acquisition of an asset.

Moreover, the court stated the decision in *Primuth* to be consistent with the position taken by the Commissioner in Revenue Ruling 60-223 (allowing fees paid to employment agencies for securing employment).

The court responded to the Commissioner’s arguments by stating that whether Chusid might be classified as an employment agency was unimportant; important, the court indicated, was “that Chusid did all that any third party can do to secure employment for the petitioner. . . .”⁴⁹ The court thus adopted the position of the taxpayer in *Ryan*.⁵⁰ And, even though the fee was payable in all events, they regarded the distinction as unimportant if employment actually results.

In his concurring opinion, Judge Tannewald expressed his full agreement with the result reached by the majority, on the grounds that drawing distinctions “based upon the difference between ‘seeking’ and ‘securing’ employment, upon whether the fee of the employment agency is contingent or payable in any event, or upon whether the agency’s efforts are successful or unsuccessful simply adds unnecessary confusion and complexity to a tax law which already defies understanding even by the sophisticated taxpayer.”⁵¹ In these cases he would adopt a simple test based on a comparison of the position occupied by the petitioner before and after the acquisition of the new employment. If the position occupied after the change is comparable to that occupied before the change then the expenses are deductible. For purposes of this comparison, he would have narrowed the majority’s categorization of the petitioner’s position from a corporate executive to a financial corporate executive.⁵²

47. David J. Primuth, 54 T.C. at 377.

48. *Id.* at 379.

49. *Id.* at 380.

50. 28 P-H Tax Ct. Mem. 506 (1959).

51. 54 T.C. at 381.

52. *Id.* at 382.

In other separate opinions, Judge Simpson concurred on the grounds that no legal basis had been established for denying a deduction for the expenses of seeking a new position in the same trade or business; Judge Featherton concurred solely on the grounds that the petitioner's activities fully met the requirement of Revenue Ruling 60-223.⁵³

Judge Tietjens, with five other judges concurring, dissented arguing that the expenses incurred by the petitioner were the same as investigation expenses in locating or finding a new business and therefore not deductible.⁵⁴

The Tax Court, in subsequent opinions, has expanded the holding of *Primuth*. In *Guy R. Motto*, the court extended the holding of *Primuth* to allow the deduction of expenses incurred by a petitioner who, as result of Chusid's efforts, obtained new employment as a section head of the mechanical division of Guepel Architects and Engineers.⁵⁵ Prior to enlisting the services of Chusid (under terms similar to those in *Primuth*) the petitioner became dissatisfied with his existing employment because he felt his employer was not making full use of his potential and because he desired a position which would yield a greater income coupled with a more challenging and responsible career.

The Tax Court, in reversing the Commissioner's determination of a deficiency, held that the expenses were deductible under Section 162 of the Internal Revenue Code, because they were incurred by the petitioner in carrying on his trade or business of being an engineer. In reaching this result, the court stated that "[t]his case is indistinguishable from our recent court-reviewed opinion in *David J. Primuth*."⁵⁶ The court argued that the sole difference between the cases was that in *Primuth* the petitioner was a corporate executive, whereas in *Motto* the petitioner was an engineer.

In *Kenneth R. Kenfield*,⁵⁷ the Tax Court was again confronted with the question of the deduction of fees paid to Chusid. Petitioner was a design engineer with General Electric, and became dissatisfied with his "prospects" and wished to increase his salary. Petitioner engaged Chusid in order to secure another job as a design engineer. As a result of Chusid's efforts, the petitioner received a firm job offer at an increased salary from American Steel Foundries, Inc.. Kenfield accepted the offer

53 *Id.* at 384.

54 *Id.*

55 54 T.C. 558 (1970).

56 *Id.* at 559.

57 54 T.C. 1197 (1970).

but two days prior to his departure from General Electric, General Electric offered him a salary increase similar to that offered by American and a promotion to manager of the "Fuel and Ignition Systems Development" group. Petitioner accepted General Electric's offer. General Electric was not aware of Chusid's efforts in the petitioner's behalf or of American's offer. General Electric made its offer solely on the basis of the knowledge that the petitioner intended to leave and on discussions with him.

The Commissioner disallowed the deduction of the fee paid to Chusid because the expenses of seeking employment constitute personal expenses which are specifically non-deductible under section 262 of the Internal Revenue Code.⁵⁸

The court, in an unreviewed opinion, held the petitioner's payment to Chusid in connection with his search for a new job was deductible under section 162 as ordinary and necessary business expenses. In reaching this result, the court reasoned that since the petitioner was in the trade or business of being an engineer both before and after engaging the service of Chusid, the case fell within the rule announced in *Primuth*⁵⁹ and *Motto*⁶⁰ and therefore the expenses were proximately related to the petitioner's trade or business as an engineer. The Commissioner's argument, that the case was distinguishable from *Primuth* and *Motto* because the petitioner did not obtain new employment, was rejected by the court because petitioner had in fact obtained a job with a new employer through Chusid's efforts which he chose not to accept. Moreover, General Electric's new offer was in part due to Chusid's efforts.⁶¹

The rationale laid down in *Primuth* was further extended in *W. Richard Gerhard*.⁶² Gerhard was employed as general manager of Automatic Lathe Cutterhead Company. Prior to his termination with Automatic, the petitioner retained an employment agency and expended personal efforts in his search for new employment. As a result of his personal efforts he obtained a position as controller for Helgensen Harvestore Inc. Petitioner deducted the fee paid to the employment agency and his out-of-pocket expenses from his 1967 return. The

58. *Id.* at 1199.

59. 54 T.C. 374 (1970).

60. 54 T.C. 558 (1970).

61. 54 T.C. at 1200.

62. P-H Tax Ct. Mem. 1970-262.

Commissioner allowed the deduction of fees paid to the employment agency, but assessed a deficiency for the out-of-pocket expenses.⁶³

The Tax Court, in a memorandum opinion, held that the expenses were deductible under the doctrine set forth in *Primuth*. Moreover, the court in reaching this result rejected the Commissioner's attempt to distinguish the case from *Primuth* on the grounds that the petitioner had entered a new business.⁶⁴

With this case, the Tax Court seemed to adopt the position specifically rejected four years earlier in *Francois Louis* and to open the door for any expenses incurred in seeking employment. The government also has changed its position in light of recent cases. After originally filing an appeal to *Primuth* the Justice Department withdrew it. The Service also is re-evaluating Revenue Ruling 60-223 in light of the *Primuth* decision and will issue a new revenue ruling to cover the subject.

Although the position the Service will take is not known, it will probably be similar to the position taken by the Solicitor General in withdrawing the government appeal to *Primuth*. The Solicitor General took the position that any fees paid to an employment agency or firm are deductible so long as the taxpayer obtains employment.⁶⁵

Although this will clarify some of the uncertainties under Revenue Ruling 60-223, it still leaves unanswered *individual expenses* incurred by the taxpayer in obtaining employment. Even though the new revenue ruling may provide a more liberal position, the tax court's allowance of individual expenses incurred by the taxpayer in *Gerhard* indicates a willingness to extend the concept further.⁶⁶

III. ANALYSIS

The importance of *Primuth* seems to lie in the liberal definition afforded trade or business and in the court's attempt to quash the

63. The facts related in the text are not contained in the Court's opinion. For source material see Telephone Interview with U.S. Government Tax Counsel, Nov. 18, 1970, on file Washington University Law Quarterly.

64. P-H Tax Ct. Mem. 1970-262.

65. Telephone Interview with U.S. Government Tax Counsel, Nov. 18, 1970, on File Washington University Law Quarterly.

66. It should be noted that this is a Memorandum Decision when considering its authoritative value. In another recent case, *Gale C. Huber*, P-H Tax Ct. Mem. 1970-219, the court again allowed the deduction of individual expenses incurred in obtaining a taxpayer a new position after originally contacting Chusid. Although the court stated that the "deductions cannot require that the employment service procure the new employment single handedly", it did find Chusid was some assistance to the taxpayer and on this ground distinguished its holding from *Morris v. Comm.* *supra* note 38.

distinction between seeking and securing employment. Prior to *Primuth* the courts had taken a restrictive view as to the existence of a trade or business. Seeking employment presupposed the non-existence of a trade or business and, hence, the courts found little difficulty in denying the deductibility of expenses incurred in such activity. Faced with the Commissioner's allowance of *fees paid to secure* employment, however, the courts formulated the rationale that such expenses were incident to the taxpayers new trade or business and, therefore, deductible.

What followed were attempts by taxpayers to attach the "securing" label to these expenses, thereby allowing them to come under the cover of a trade or business. In response, the Commissioner found it necessary to formulate hollow arguments to distinguish seeking from securing—as exemplified by his position on contingent and noncontingent fees paid to employment agencies set forth in *Primuth*. This already complex question, therefore, became subjected to a nonsensical play on words.

Primuth and subsequent cases attempted to end this inanity but they also did more. By liberalizing the scope of inquiry into what may constitute a trade or business, the court made possible the deductibility of previously unallowable expenses and undercut the Service's contention that expenses incurred in seeking employment were not deductible.

A. Section 162

Section 162 of the 1954 Internal Revenue Code allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."⁶⁷

With this apparent statutory support for an "existing trade or business" it becomes necessary to investigate the scope of the term.⁶⁸ Although the term "trade or business" appears 170 times in 60 code sections and has never been defined in a revenue act,⁶⁹ the term business was defined early by the Service as:

That which occupies and engages the time, attention and labor of anyone for the purpose of livelihood, profit or improvement; that which is his

67. INT. REV. CODE of 1954, § 162(a).

68. See Groh, "Trade or Business". *What It Means, What it is and What it is not*, 26 J. TAX. 78 (1967). 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.08 (J. Malone ed. 1968). 1 J. RABKIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 3.02(1) (1970).

69. Groh, "Trade or Business". *What it Means, What it is and What it is not*, 26 J. TAX. 78, 80 (1967).

personal concern or interest, employment, regular occupation, but it is not necessary that it should be his sole occupation or employment.⁷⁰

Although this definition was later narrowed⁷¹ it has been consistently held that an employee is in the trade or business of selling his services.⁷² The scope of the inquiry narrows, therefore, to determining whether or not he loses this status if unemployed or changes employers.

As has been discussed earlier, the cases denying deductions for expenses incurred in seeking employment have reasoned that seeking employment implies no existing trade or business or economic interest. This narrow view is inconsistent with both case law and Service position. As explained in *Daily Journal Co. v. Commissioner*, “[i]t would be an absurdity to hold that one person with long established skills in management is not engaged in managerial business, if by agreement he supplies that skill to another.”⁷³

This was later reiterated by the Service when it stated:

It would be most unrealistic, regardless of the proper treatment in other cases, to treat a wage earner whose livelihood is regularly gained from a series of *relatively short employments* for various employers as having no trade or business during intervals between such employment. (Emphasis added)

and:

The Service, therefore, will continue to treat a wage earner whose livelihood consists of a series of *relatively short employments* for various employers as having a trade or business of his own, providing, of course,

70. Messamer, *What Constitutes a Trade or Business Under Federal Income Tax Laws*, 3 KAN. L. REV. 98, 106 (1954), citing: T.D. 1983, 16 TREAS. DEC. INT. REV. 84 (1914).

71. *Higgins v. Comm.*, 312 U.S. 212 (1941) (More limited than concept of actively engaged in for profit). Also Charles H. Schafer 33 P-H Tax Ct. Mem. 1021 (1964); *McDowell v. Ribicoff*, 292 F.2d 174 (3d Cir. 1961); Rev. Rul. 5, 1958-1 CUM. BULL. 322 (not only profit but extensive activity over a substantial period of time during which the taxpayer holds himself out as selling goods or services); 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.08 at 29 (J. Malone ed. 1968).

72. *Deputy v. DuPont*, 308 U.S. 488, 499 (1940) (concurring opinion of Justice Frankfurter “... holding one’s self out to others as engaged in the selling of goods or services”); Harold A. Christensen, 17 T.C. 1456 (1952); Benjamin Abraham, 9 T.C. 222 (1947); Ralph C. Holmes, 37 B.T.A. 865 (1938); Peoples-Pittsburgh Trust Co., 21 B.T.A. 588 (1930), *aff’d*, 60 F.2d 187 (3rd Cir. 1932); *Mitchell v. United States*, 408 F.2d 435 (Ct. Cl. 1969). See also Dobris, *Employee’s Expenses in Earning Salary*, 20 N.Y.U. INST. ON FED. TAX. 119, 120 (1962); Rev. Rul. 189, 1960-1 CUM. BULL. 60; I.T. 4012, 1950-1 CUM. BULL. 33; Rev. Rul. 190, 1953-2 CUM. BULL. 303, 305; Treas. Reg. §§ 1.162-2(d), -5(a) & (d).

73. 135 F.2d 687, 688 (9th Cir. 1943) (attempts by taxpayer to deduct salary as president). See also Harold Haft, 40 T.C. 2, 6 (1962); *Furner v. Comm.*, 393 F.2d 292 (7th Cir. 1968); *cf.* *Ditmars v. Comm.*, 302 F.2d 481 (2d Cir. 1962).

that the facts in the particular case show a real and substantial business justification for engaging in the several employments, such as the necessities of a regular trade. (Emphasis added)⁷⁴

This position was extended to other employees in 1968 when the Service stated:

Suspension of employment for a period of a year or less after which the taxpayer resumes the same employment or trade or business, will ordinarily be considered temporary, with the result that the taxpayer will be considered to be engaged in a trade or business in the interim.⁷⁵

The *Primuth* court analysis therefore seems entirely consistent with the Service's position, and the inquiry then turns to how the change or attempted change of employment affects the taxpayer's status of being in a trade or business.

The deduction will depend on whether a court takes a broad or narrow view of a taxpayer's trade or business. "A trade or business encompasses a certain range of activities and therefore the broader the court's view, the more the activities included."⁷⁶ This concept is graphically illustrated in *Primuth* itself wherein three different opinions are expressed as to the petitioner's trade or business: corporate official, financial corporate official, and employee of each respective company.⁷⁷

Although an all encompassing standard may be impossible to frame and results will ultimately rely on ad hoc decision,⁷⁸ what is important is that the taxpayer can be seeking employment while still being in a "trade or business."⁷⁹ Once this is recognized, the question then can be handled

74. Rev. Rul. 189, 1960-1 CUM. BULL. 60, 66.

75. Rev. Rul. 591, 1968-2 CUM. BULL. 73.

76. Fleischer, *The Tax Treatment of Expenses Incurred in Investigating for a Business Investment*, 14 TAX. L.R. 567, 579 (1959). Also compare the Tax Court's view and the Court of Appeals' view in *J.W. York*, 29 T.C. 520 (1957), *rev'd*, 261 F.2d 421 (4th Cir. 1955).

77. 54 T.C. 374 (1970).

78. *Beamsley v. Comm.*, 205 F.2d 743, 748 (7th Cir. 1953) (different theories are "[a]s thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had been starved to death"). See generally 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.08 (1967); Groh, "Trade or Business". *What it Means, What it is and What it is not*, 26 J. TAX. 78 (1967); For case treatment of this question see, e.g., *Benjamin Miggins*, 18 P-H Tax Ct. Mem. 49 (1949); *Henry G. Owen*, 23 T.C. 377 (1954); *M.M. Brooks*, 30 T.C. 1087 (1958), *rev'd on other grounds*, 274 F.2d 96 (9th Cir. 1959); *Kaufman v. United States*, 233 F. Supp. 123 (E.D. Pa. 1964); *Paul C. Seguin*, 36 P-H Tax Ct. Mem. 1041 (1967); *Furner v. Comm.*, 393 F.2d 292 (7th Cir. 1968); *Don Cornish*, P-H Tax Ct. Mem. 1970-51; *Yaroslav Horodysky*, 54 T.C. 490 (1970); *Jeffrey L. Weiler*, 54 T.C. 398 (1970); *Hochschild v. Comm.*, 161 F.2d 817 (2d Cir. 1947); *Albert Ravano*, P-H Tax Ct. Mem. 1967-170; *York v. Comm.*, 261 F.2d 421 (4th Cir. 1958).

79. *McGovern v. Comm.*, 42 T.C. 1148 (1964) (allowed fees paid to nurses's registry); *Virginia C. Avery*, P-H Tax Ct. Mem. 1970-269 (allowed want ad costs for legal secretary).

as would be any other business expenses without the mechanical application of catch words or phrases.⁸⁰

B. Section 212

Section 212 provides:

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. . . .⁸¹

It would seem that regardless of the results of the inquiry into the taxpayer's trade or business, seeking employment would fall directly under this section of the code. While such a result would be reached by a literal reading of this section, subsequent history has restricted its application to an *existing right or interest* thus putting it on an equal footing with § 162.⁸² This position has been formalized by Treasury Regulation § 1.212(1)(f) which specifically prohibits deducting expenses for seeking employment under this section. Although this position has been criticized as unwarranted,⁸³ there is ample evidence to support both sides.⁸⁴ To base the validity of deducting expenses incurred in seeking

80. 54 T.C. 374, 379-81 (1970).

81. INT. REV. CODE OF 1954 § 212(1).

82. Rev. Rul. 237, 1955-1 CUM. BULL. 317 (motion picture investor may not deduct the cost of a European trip to explore investments in films, because he had *no existing right or interest in the production of income*); see, e.g., Eugene H. Walet, Jr., 31 T.C. 461 (1958), *aff'd per curiam*, 272 F.2d 694 (5th Cir. 1959); Charles R. Rhodes, 33 P-H Tax Ct. Mem 2270 (1964); Sturgeon v. McMahon, 155 F. Supp. 628 (S.D.N.Y. 1957); Weinstein v. United States, 420 F.2d 700 (Ct. Cl. 1970). See also Nahstoll, *Non-Trade and Non-Business Expenses Deductions*, 46 MICH. L. REV. 1015 (1948); Edelman, *Non-Trade or Non-Business Expenses*, 7 N.Y.U. INST. FED. TAX. 965 (1949).

83. Fleischer, *The Tax Treatment of Expenses Incurred in Investigation for a Business or Capital Investment*, 14 TAX L. REV. 567, 581 (1959); see also Note, *Investigation Costs: An Analysis and a Proposal*, 41 TEMP. L. REV. 81, 89-93 (1967); McDonald v. Comm., 323 U.S. 57, 65-69 (1944) (Black, J., dissenting).

84. The foundation for the existing interest doctrine is found in McDonald v. Comm., 323 U.S. 57 (1944). In that case the petitioner, a judge, was attempting to deduct his campaign expense for reelection. Although recognizing the business of being a judge, the Court held that the subject expenses were incurred in trying to be a judge and "[t]he amendment of 1942 [the predecessor of § 212] merely enlarged the category of incomes with reference to which expenses were deductible. It did not enlarge the range of allowable deductions of 'business' expenses. In short the act of 1942 in no wise affected the disallowance of campaign expenses as consistently reflected by legislative history, court decisions, Treasury practice and Treasury regulations." *Id.* at 62. The Court, therefore, required all the existing restrictions applied to expenses under § 23(a)(1) [§ 162] be applied to § 23(a)(2) [§ 212]. This would seem consistent with the reasons behind the drafting of § 23(a)(2).

The Supreme Court three years earlier, in Higgins v. Comm., 312 U.S. 212 (1941), found the term trade or business did not apply to a wealthy investor who personally managed his investments

employment on a literal reading of section 212 is therefore a weak argument. It is equally clear, however, that the explicit prohibition against "seeking employment" expenses in the regulations under § 212,⁸⁵ while consistent with the existing right or interest doctrine, no way forecloses the possibility of allowing the deduction under § 162 if in fact a trade or business is found to exist.⁸⁶

C. Section 262

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal living, or family expenses.⁸⁷

It has already been noted that this section is commonly used in denying the deductibility of expenses for *seeking* employment. The court in *Primuth*, however, refused to view *all* the expenses for seeking employment as being under this broad designation, but rather looked at

from Paris and in so doing incurred expenses of maintaining an office in New York. To remedy this § 23(a)(2) was passed which allowed deductions for expenses paid or incurred for the production or collection of income or for the management, conservation or maintenance of property held for the production of income. (See H.R. REP. NO. 2333, 77th Cong., 1st Sess. 74, 76 (1942), 1942-2 CUM. BULL. 372, 410, 429; S. REP. NO. 1631, 77th Cong., 2d Sess. 87, 88 (1942), 1942-2 CUM. BULL. 504, 570).

The advocates of a more liberal reading call attention to the fact that had Congress only desired to remedy Higgins it would not have gone past the allowance of deductions incurred for the management, conservation or maintenance of property. By adding an additional allowance for expenses incurred in producing income, it is argued that "[b]efore the 1942 Act an expense to be deductible had to be 'ordinary and necessary' in its relation to the taxpayers business; under the new section it need only be 'ordinary and necessary' in relationship to the taxpayer's effort to produce income". 323 U.S. at 66, *also*, Fleischer, *The Tax Treatment of Expenses Incurred in Investigating for a Business or Capital Investment*, 14 TAX L. REV. 567 (1959); *also*, "The bill contains a provision which will allow taxpayers to deduct expenses incurred for the production or collection of income whether or not such expenses are connected with the taxpayer's trade or business. Furthermore, the amendment prevents the deduction of expenses incurred for the management, conservation, or maintenance of property held by the taxpayer for the production of income." 88 CONG. REC. 6367 (1942) (remarks of Representative Disney).

Although this argument is plausible it seems to depend on the scope of the word property as used in the statute. Therefore, it does not seem persuasive in rebutting the obvious historical development.

The repeated judicial and governmental application of the existing right doctrine (*see* note 82 *supra*) together with Congress' passage of § 212 in the 1954 Internal Revenue Code in the same form as § 23(a)(2), would also seem to adequately answer the above arguments.

85. Treas. Reg. § 1.212-1(f) (1957)

(f) Among expenditures not allowable as deductions under section 212 are the following: ". . . expenses such as those paid or incurred in seeking employment or in placing oneself in a position to begin rendering personal services for compensations."

86. This is borne out by the skepticism of the *Primuth* court to use § 212 while having no difficulty applying § 162. 54 T.C. at 381.

87. INT. REV. CODE OF 1954, § 262.

the character of *each* expenditure to determine if it was a business expense. In the Tax Court's analysis of the character of each expense, it implicitly rejected the notion that any expenditure for seeking employment is personal. This is seen in the statement, "[a]n employment fee by its very nature bears no relationship to personal expenses but instead bears a direct relationship to the receipt of income."⁸⁸ This same idea is later explicitly stated: "Personal expenses should be limited to those which are not acquisitive in character from an income-producing point of view."⁸⁹ Therefore, what the *Primuth* court has done, by its statement that expenses for seeking employment are in no way personal, is to impose a requirement of an in depth investigation into the nature of each expense.

Traditionally, when courts have been confronted with expenses having both personal and business elements, several tests were applied to determine the deductibility of the expenses as a whole.⁹⁰ Some courts have favored what is termed the "mixed motive theory" in which the test is one of relative weight.⁹¹ If the expense is primarily personal in nature; then no deduction is available to the taxpayer.⁹² This result is reached even though the expenditure is tainted with certain "business motives". One of the earliest cases utilizing the mixed motive test was *Louis Drill*⁹³ in which the petitioner was an outside superintendent in a construction firm. His clothing often became soiled with plaster, cement, grease, mud, etc., and, therefore, he deducted \$75 for clothing expenses.⁹⁴ In denying

88. 54 T.C. at 381.

89. *Id.* at 381. See Fleisher, *The Tax Treatment of Expenses Incurred in Investigating for a Business Investment*, 14 TAX L. REV. 567, 573 n.33 (1959) [citing 4 J. MERTENS, FEDERAL INCOME TAXATION § 25.91 (1954) in which it was stated, "A job seeking expenses is acquisitive and not personally motivated; it is impelled by a taxpayer's intent to make himself an income-producing asset."]

90. See generally 1 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 3 05 (1956).

91. "The question whether or not a transaction is carried on primarily for the production of income or for the management, conservation, or maintenance of property held for the production or collection of income, rather than primarily as a sport, hobby, or recreation, is not to be determined solely from the intention of the taxpayer but . . . [consideration] will be given to the record of prior gain or loss of the taxpayer in the activity, the relation between the type of activity and the principal occupation of the taxpayer, and the uses to which the property or what it produces is put by the taxpayer." Treas. Reg. § 1.212-1(c) (1957).

92. Conversely, if the expense is predominantly "business" in nature then it has been held deductible regardless of a "personal" nature. *Nora P. Hill v. Comm.*, 13 T.C. 291 (1949), *rev'd*, 181 F.2d 906 (4th Cir. 1950) (Court of Appeals allowing summer school expenses for teacher).

93. 8 T.C. 902 (1947).

94. Petitioner also worked overtime on several occasions and deducted the cost of the meals. The deduction was disallowed because it was held to be a personal expense. The court stated, "It is only

the deduction, the court reasoned that clothing is about as personal as any expenses can be.⁹⁵

Expenses for personal grooming have also been held to be primarily personal in nature and thus non-deductible. In *Richard Drake*⁹⁶ the petitioner was an enlisted man in the army and was required to have his hair cut more often than his personal desires dictated. The Tax Court in denying the expenses of hair cuts reasoned that:

Expenses for personal grooming are inherently personal in nature; The fact that the army may have required such grooming does not make the expenses therefor any less personal. The evidence showed that the Army's requirement was directed toward the maintenance by the petitioner of a high standard of personal appearance and not toward the accomplishments of the duties of his employment.⁹⁷

This reasoning was also employed in *Sparkman v. Comm.*⁹⁸ in which the taxpayer was a motion picture actor and radio performer. In order to perfect his enunciation he bought two sets of false teeth to eliminate a hiss. The court of appeals denied the deduction of the expenses holding that nothing is more personal than false teeth.⁹⁹

in connection with travel expenses that the statute makes specific provision for the deduction of the cost of meals." 8 T.C. at 903. *Accord*, Charles Gunther 23 P-H Tax Ct. Mem. 913, 920 (1954) (in which the court held: ". . . individual's expenses for evening meals eaten while he is working over-time are personal and, therefore, non-deductible under § 24(a)(1) of the 1939 Code. We think this is so whether the individual is an employee, partner, or sole proprietor."); Richard A. Sutter, 21 T.C. 170, 173 (1953) [". . . The cost of meals, entertainment, and similar items for one's self and one's dependents, at least if not incurred while away from home in the pursuit of one's business, see § 23(a)(1)(A), Internal Revenue Code, is ordinarily and by its very nature personal expenditures forbidden deduction by § 24(a)(1). The presumption, no doubt rebuttable, must accordingly arise that such costs are non-deductible. In addition to the burden imposed by the necessity of overcoming respondent's determination we think the presumptive non-deductibility of personal expenses may be overcome only by clear and detailed evidence as to each instance that the expenditure in question was different from or in excess of that which would have been made for the taxpayer's personal expense."]; James Schulz, 16 T.C. 401 (1951).

95. 8 T.C. at 903. *Accord*, Carrol v. Comm., 418 F.2d 91, 95 (1969) in which the court stated "Many expenses such as . . . clothing . . . are related and even necessary to an individual's occupation or employment, but may not be deducted under § 162(a) since they are essentially personal expenditures." See also Betsy Luck, 30 T.C. 757 (1958); Louis M. Roth, 17 T.C. 1450, 1455 (1952); Helen Krusko Harsaghy, 2 T.C. 484 (1943); George E. Hall, Administrator, 10 B.T.A. 847 (1928). *But see*, Charles Hutchinson, 13 B.T.A. 1187 (1928) in which a "stunt" actor required to provide costumes at his own expense, was allowed the cost of replacing such clothing as an ordinary and necessary expense of his business.

96. 52 T.C. 842 (1969).

97. *Id.* at 844.

98. 112 F.2d 774 (9th Cir. 1940).

99. See Paul Bakewell, Jr. 23 T.C. 803, 805 (1955) in which the petitioner was an attorney and used a hearing aid at all times. The court denied the deduction for the maintenance of the hearing aid

Expenses incurred in traveling to and from one's place of business have traditionally been held to be personal commuting expenses, and non-deductible. In *James P. Marzano*¹⁰⁰ the petitioner, a police officer, could have used public transportation free of charge to commute to and from work. Instead, he chose to drive his own automobile claiming that it took longer to use public transportation and that his equipment was too bulky to carry. The court held that even though it would have been inconvenient for the taxpayer to use public transportation, it was not an impossibility, and thus his decision to drive was for personal reasons and the expenses non-deductible.¹⁰¹

Another test employed by the courts in the "profit v. personal satisfaction test."¹⁰² If the taxpayer has a profit motive, the activity may be deductible as a business expense regardless of the amount of personal satisfaction derived from such activity.¹⁰³ This concept is well illustrated in *Benjamin E. Adams*¹⁰⁴ in which the petitioner decided to study art on a full-time basis. The petitioner made no sales from 1959-1962 but he still believed he could earn a living as an artist. The Tax Court stated that whether activities were carried on for recreation or for pleasure is a matter of the intention of the petitioner. In other words, the petitioner

stating: "Even if it is used in petitioner's business, in fact even if it is necessary for his successful law practice, the device is so personal as to preclude it from being a business expense. . . . [T]he necessity does not overcome the personal nature. . . ." *But see* Reginald Denny, 33 B.T.A. 738 (1935) in which the petitioner, a motion picture actor, was allowed to deduct as an ordinary and necessary expense incurred in his business the cost of dental bridge work to take the place of teeth lost in making a prize fight picture.

100. P-H Tax Ct. Mem. 1970-159.

101. *But, e.g.*, Rev. Rul. 100, 1963-1 CUM. BULL. 34; James A. Kistler, 40 T.C. 657 (1963); Cases in support of nondeductibility of commuting expenses are: Margaret Galotta Sheldon, 50 T.C. 24 (1968); Lenke Marot, 36 T.C. 238 (1961); Frank H. Sullivan, 1 B.T.A. 93 (1924); Mort L. Bixler, 5 B.T.A. 1181 (1927); Charles H. Sachs, 6 B.T.A. 68 (1927); Abraham W. Ast, 9 B.T.A. 694 (1927); Charles Crowther, 28 T.C. 1293 (1957), *rev'd*, 269 F.2d 292 (9th Cir. 1959). It must be recognized that the courts draw a distinction between expenses of traveling incurred in carrying on a trade or business and commuting expenses. William L. Heuer, Jr., 32 T.C. 947 (1959), *aff'd per curiam*, 283 F.2d 865 (6th Cir. 5, 1960); Bruton v. Comm., 9 T.C. 882 (1947).

102. 1 J RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT & ESTATE TAXATION § 3.05 (1970).

103. But where the activity is carried on for personal satisfaction and prestige, without substantial prospect of profit, it is not deductible as a business expense. 1 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT & ESTATE TAXATION § 3.05 (1970). In Rev. Rul. 55-291, the taxpayer was a president of a corporation engaged in the food and chemical processing industry. He was appointed as lecturer on food technology at X college at a salary of \$1.00 per year. The court denied the deduction for the expense incurred for material used in the lectures, radio, T.V. appearances, etc., stating that the expenses were personal for the sole purpose of increasing prestige and establishing his professional reputation. Rev. Rul. 291, 1955-1 CUM. BULL. 317.

104. 35 P-H Tax Ct. Mem. 1390 (1966).

must have a "profit motive."¹⁰⁵ Because the taxpayer was not a wealthy man who can afford to indulge in a full-time hobby and because he gave up the idea of becoming an artist for another job, the court allowed the deduction as ordinary and necessary expenses of carrying on a business.¹⁰⁶

The courts have considered several factors in determining whether the activity of the petitioner is a hobby from which he derives personal satisfaction, or whether the petitioner has a profit motive. In *Lincoln A. Bolt*,¹⁰⁷ the Tax Court considered such factors as the time devoted by the petitioner to the activity, whether accurate records were kept of expenditures and income, whether the activity was operated in a business-like manner and whether the petitioner had a profit motive. The court, in allowing the deduction, concluded that petitioner, having satisfied these conditions, sufficiently came within the framework of an existing "trade or business".

The taxpayer in *Myron E. Cherry*¹⁰⁸ bought equipment to make a race track timing device. The Tax Court held the taxpayer did not have a bonafide expectation of realizing a profit because he never advertised or held himself out to be in business, because there was no evidence that he had filed an actual patent application, and because he made no effort to market, sell or manufacture the device.¹⁰⁹

105. *Id.* at 1391. *Accord*, *American Properties Inc.*, 28 T.C. 1100 (1957), *aff'd per curiam*, 262 F.2d 150 (9th Cir. 1958) ("It has been held that whether an enterprise is conducted as a business for profit is a matter of intention and good faith, and all the facts in a particular case are to be considered. . . . Intention is a question of fact to be determined not only from the direct testimony as to intent, but from a consideration of all the evidence, including the conduct of the parties.") *Charles A. Dun Leavay*, 34 P-H Tax Ct. Mem. 944 (1965) in which the court found that the petitioner did not expect to realize a profit and denied the deduction; *Henry L. Sutherland*, 35 P-H Tax Ct. Mem. 926 (1966) in which the court was unable to ascertain with certainty the motive of the petitioners and therefore denied the deduction.

106. *Benjamin E. Adams*, 35 P-H Tax Ct. Mem. 1392 (1966). *Accord*, *Charles D. Eggert*, 26 P-H Tax Ct. Mem. 854 (1957); *Sebastian De Grazia*, 31 P-H Tax Ct. Mem. 1742 (1962); *American Properties Inc.*, 28 T.C. 1100 (1957), *aff'd per curiam*, 262 F.2d 150 (9th Cir. 1958).

107. 50 T.C. 1007 (1968).

108. 36 P-H Tax Ct. Mem. 603 (1967).

109. *Id.* at 608. *Accord*, *James A. Warren*, 37 P-H Tax Ct. Mem. 1037 (1968), in which the court held the petitioner lacked the profit motive necessary. The court held the petitioner's real and dominant motive was purely personal; *Marcell N. Rand*, 34 T.C. 1146 (1960) held the expenses for maintenance of yacht were not deductible because the yacht was primarily for pleasure rather than for production of income. The petitioner claimed he had chartered out the yacht as an income producing venture. The court stated there was no definite abandonment from holding for his personal use to a holding for income producing purposes; *Robert Lee Henry*, 36 T.C. 879 (1961) involved a tax specialist, who for health reasons was forced to give up riding for boating. The court denied the deduction for the maintenance of the yacht because he had not shown that he was not substituting one personal interest or sport for another. He had also failed to offer a single example of a client derived from the boating contact.

It must be emphasized that a profit motive alone does not make the expenditure fall within the framework of "trade or business". This is illustrated in *Kerns Wright*¹¹⁰ in which the taxpayer was a lawyer by profession. He and his wife decided to travel around the world and write a book about the trip with the intent to make a profit from the book sales. The Tax Court denied the deduction stating that "To allow the deduction of such expenditures to two people who have never been engaged in the business of writing and have no intention of attempting to earn a livelihood in the future in such business would be an invitation to many taxpayers to convert pleasure trips into business trips at the expense of the revenue."¹¹¹ The court also concluded that engaging in an activity with the hope of making a profit does not mean that one is engaged in a trade or business.

Another test, not actually applied by the courts but which has been employed as a taxpayer's argument, is the "but for" test.¹¹² Although this test is not accepted by the courts, the taxpayer would argue that "but for" his engaging in a "trade or business" the expenses would not have been incurred.

The taxpayer in *Ronald D. Kroll*¹¹³ proposed this argument but the Tax Court held that it was not sufficient to allow a deduction. It must be determined that the nature of the expenses is not personal or of a deductible nature.¹¹⁴

The test which affords the most logical and rational result is that of allocation. When the expense is a combination of "personal" and "business" elements, the courts allow as a deduction only that portion of the expense which is "business" in nature.¹¹⁵

As indicated in the above discussion, courts have traditionally looked to the intent or subjective motivations of the taxpayer to determine what portion of the expense is personal as opposed to business. It is at this point the court could allocate the deductibility of the expense. *Primuth* on the other hand foreclosed the use of any of these tests because the

110. 31 T.C. 1264 (1959).

111. *Id.* at 1268.

112. See Kilbourn, *Deductible Expenses: Transactions Entered into for Profit; Income Producing Property*, 21 N.Y.U. INST. ON FED. TAX. 193, 200 (1963).

113. 49 T.C. 557 (1968).

114. *Id.* at 567. *Accord* Don Page, P-H Tax Ct. Mem. 1970-112; Henry C. Smith, 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

115. *Accord*, Rev. Rul. 180, 1962-2 CUM. BULL. 52; Manu-Mine Research and Development Company, 36 P-H Tax Ct. Mem. 1382 (1967); Karl Schmitt 36 P-H Tax Ct. Mem. 807 (1967); Henry G. Wilton, 34 P-H Tax Ct. Mem. 1815 (1965).

court refused to recognize any mixture of *business* and *personal* elements. It merely concluded that there was *no personal element* in an employment fee. In reaching this conclusion, the court has adopted an objective test.¹¹⁶ The court merely looks at the nature of the expenses and concludes that they were “business” oriented regardless of the reasons for which they were incurred. It completely refuses to recognize that the expenses were incurred because Primuth was personally dissatisfied with his old employment. This holding is doubly important, however, for not only did the court refuse to allow the petitioner’s personal motivation to impute a personal element to the expense, but it also refused to allow the fact of seeking employment to impute a personal element either. Thus the Service’s position that expenses incurred in seeking employment are personal now has doubtful validity.

An explicit enunciation of *why* expenses incurred in seeking employment are personal has not been set forth by the Commissioner. These expenses have, however, been likened to good will and

116. Prior to the 1969 Tax Reform Act, § 217 enacted in 1964 was intended to apply only to those who were employed by others. The basis for this exclusion of the self-employed person was that in self-employment there is no possibility of transfer and moves are made purely for personal reasons. This idea embodies the objective motivational theory. Subsequent to the 1969 Tax Reform Act, the self-employed individual was included within the scope of § 217. Thus, in the moving expense area, the court has proceeded from the subjective test to an objective test. P-H Tax Ct. Mem. 1970-262.

The subjective motivational approach was also applied in determining the deductibility of educational expenses prior to the issuance of a revised regulation. Tres. Reg. § 1.162-5(b)(3) (1967) provides:

Qualification for new trade or business. (i) The second category of non-deductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is part of a program of study being pursued by him which will lead to qualifying him in a new trade or business. In the case of an employee, a change of duties does not constitute a new trade of business if the new duties involve the same general type of work as is involved in the individual’s present employment. For this purpose, all teaching and related duties shall be considered to involve the same general type of work. The following are examples of changes in duties which do not constitute new trades or business:

- (a) Elementary to second school classroom teacher.
- (b) Classroom teacher in one subject (such as mathematics) to classroom teacher in another subject (such as science).
- (c) Classroom teacher to guidance counselor.
- (d) Classroom teacher to principal.

Since the issuance of this regulation, the court has employed an objective standard in determining the deductibility of educational expenses. Under the objective standard, the taxpayer is not allowed a deduction if his program of study will qualify him for a new trade or business. See Jeffrey L. Weiler, 54 T.C. 398 (1970); Ben (Bong) H. Kim, P-H Tax Ct. Mem. 1969-126; Ronald F. Weiszmann, 52 T.C. 1106 (1969).

investigating costs.¹¹⁷ As such they have been held not proximately related to the taxpayer's trade or business. This position is supportable if a limited definition is afforded an employee's trade or business. Once the definition is expanded, activities directed at seeking new employment may easily fall within the newly recognized trade or business. Under a

117 One of the most perplexing problems in tax law is determining whether an expenditure is currently deductible or whether it must be capitalized as a long-term investment. The test usually accepted is whether the item is attributable to the current operation of the taxpayer, or whether it represents an investment in future profits. 1 J. RADKIN & M. JOHNSON, *FEDERAL INCOME, GIFT AND ESTATE TAXATION* § 3.08 (Supp. 1970). At this point it must be said that a capital expenditure is an outlay of capital that results in the acquisition of property or permanently improves its value. Capital expenditures are not deductible as expenses. 2 PRENTICE-HALL, *FEDERAL TAXES* ¶ 16,681 (Supp. 1970). Thus, an argument can be made that expenses for seeking employment are capital in nature and therefore non-deductible, since the benefit derived will exceed one year in duration. Another aspect of this argument views expenses as good will and therefore non deductible. Although good will is a capital asset [INT. REV. CODE OF 1954, § 1221] the difficulty is in defining good will. The Supreme Court defined good will in *Menendez v. Holt*, 128 U.S. 514, 522 (1888):

every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

Good will has also been defined in 2 STORY, *PARTNERSHIPS* § 99 (6th ed. 1968) as:

Good will may be properly enough described to be the advantage or benefit, which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein; in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Despite the difficulties in defining good will, it is generally recognized that good will is an intangible asset existing in addition to other specific assets to which it may relate. 3B J. MERTENS, *LAW OF FEDERAL INCOME TAX* § 22.50 (J. Malone ed. 1966). See *Williams v. McGowan*, 152 F.2d 570 (2d Cir. 1945); Rev. Rul. 70, 1955-1 CUM. BULL. 370; *United States v. Woolsey*, 326 F.2d 287 (5th Cir. 1963); *Nelson Weaver Realty Co. v. Comm.*, 307 F.2d 897 (5th Cir. 1962); *Ray H. Schulz*, 34 T.C. 235, *aff'd* 294 F.2d 52 (9th Cir. 1961); *Metropolitan Laundry Co., Ltd. v. United States*, 100 F. Supp. 803 (N.D. Cal. 1951); *Strauss v. United States*, 199 F. Supp. 845 (W.D. La. 1961); *J.C. Cornille Co. v. United States*, 298 F. Supp. 887 (E.D. Mich. 1968); *Ernest B. White*, 32 P-H Tax Ct. Mem. 80 (1963); *The Hillside Dairy Company*, 13 P-H Tax Ct. Mem. 193 (1944); *Los Angeles Towel Service Co.*, 18 P-H Tax Ct. Mem. 737 (1949). The *Primuth* court discards this argument by merely stating that "the expense was not related to a purchase or sale of a capital asset." 54 T.C. at 380.

The presence of goodwill in a business usually depends on the earning power of the business which is reflected in the income the business is able to produce. 3B J. MERTENS, *LAW OF FEDERAL INCOME TAX* § 22.50 (J. Malone ed. 1966). It has been held that goodwill cannot exist without a going business to which it is incident. *Metropolitan Bank v. St. Louis Dispatch Company*, 149 U.S. 436, (1893); *Morris Gumpel, Executor*, 2 B.T.A. 1127 (1925); *William M. Wailes*, 25 B.T.A. 278 (1932); *Burke v. Canfield*, 121 F.2d 877, 880 (D.C. Cir. 1941). But it is not necessarily true that the goodwill of a business cannot be transferred apart from any tangible assets. 3B J. MERTENS, *LAW OF FEDERAL INCOME TAXATION* § 22.50 (J. Malone ed. 1966); *Falstaff Beer, Inc. v. Comm.*, 322 F.2d 744 (5th Cir. 1963); *Bird & Son, Inc. v. White*, 16 F. Supp. 168 (D.C. Mass. 1936), *Peveley*

liberal definition it is not enough, therefore, to rely on a lack of proximity to explain the personal nature of the expenses. If the Tax Court also refuses to allow the self-serving motives of the taxpayer to impute a personal nature to the expenses, there seems no foundation at all for the Service's position. This is not to say that expenses incurred in seeking employment can not be personal. The answer will depend, however, on the specific expense or expenses the taxpayer attempts to deduct rather than on the Service's categorization.

IV. THE PROBLEM IN CONTEXT

The effect of this new approach to analyzing expenses incurred in seeking employment can best be demonstrated by applying it to several hypotheticals.

As has been shown, the *Primuth* court uses a two step analysis. First, the extent of the *activities* is examined to determine whether there is an existing trade or business (or an existing right or interest) and then, secondly, the expenses are examined to determine whether they are ordinary and necessary and in fact business in nature.

A. Taxpayer Regularly Employed in an Established Trade or Business Who Either Loses his Present Position or Seeks a Change in Employment.

1. A, an engineer, becomes dissatisfied with his present employment and engages an employment agency to find him a new position on a *contingent* fee basis. The agency is successful and A accepts new employment as an engineer requiring the same duties with Company X.

BEFORE PRIMUTH—A's expenses came within Rev. Rul. 60-223 and were, therefore, deductible.

AFTER PRIMUTH—A's expenses are incurred in the trade or business of being an engineer and by their character are business in nature and, therefore, also deductible.

2. A, an engineer, becomes dissatisfied with his present employment and

Dairy Co., 1 B.T.A. 385 (1925). It has been held that if the price is greater than the worth of the tangible asset, it is assumed that good will was also purchased. Peoples Nat'l Bank, 23 B.T.A. 815 (1931); Herbert Brush Mfg. Co., 15 B.T.A. 673 (1929); American Seating Co., 14 B.T.A. 328, *aff'd on this issue*, 50 F.2d 681 (7th Cir. 1931); Union Nat'l Bank, 18 B.T.A. 468 (1929); Arthur P. Williams, 24 B.T.A. 1070 (1931); Greene & Greene, 11 B.T.A. 643 (1928).

A contract of employment with an individual for his skill, acquaintance and experience is not a purchase of goodwill. 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.40 (J. Malone ed. 1968); see also *Oppenheim's Inc. v. Kavanagh*, 90 F. Supp. 107 (E.D. Mich., 1950); *Providence Mill Supply Co.*, 2 B.T.A. 791 (1925); *Black River Sand Corp.*, 18 B.T.A. 490 (1929); *Floyd D. Arkers*, 6 T.C. 693 (1946).

engages an employment agency to find him a new position on a *contingent* fee basis. The agency is successful and A accepts new employment with an increase in pay and a promotion (although still in the engineering field).

BEFORE PRIMUTH—again the expenses were allowable under Rev. Rul. 60-223.

AFTER PRIMUTH—the change of duties does not foreclose the possibility of remaining in the same trade or business; therefore, as in number 1, the expenses would be deductible.¹¹⁸

3. Same facts as 1 and 2 but the employment agency contract is on a non-contingent fee basis.

BEFORE PRIMUTH—arguably, since the fees are to be paid regardless of the securing of a new position, the expenses do not fall literally under Rev. Rul. 60-223, and, therefore, would not be deductible.

AFTER PRIMUTH—since the expenses are incurred in an existing trade or business and are purely business in nature, the fees would be deductible.

4. Same facts as 1 and 3 but the employment agency is unsuccessful in obtaining new employment.

BEFORE PRIMUTH—the expenses are clearly for seeking employment and non-deductible.

AFTER PRIMUTH—using the same rationale as in 3, the fees would be deductible.

5. A, an engineer, becomes dissatisfied with his present employment and incurs expenses on his own to obtain a new position. A is successful in obtaining employment as an engineer with Company X.

BEFORE PRIMUTH—the expenses are not paid to an employment agency and do not fall under Rev. Rul. 60-223; therefore, non-deductible.

AFTER PRIMUTH—since incurred in an existing trade or business, the deductibility would depend on the nature of the expense. The court's decision in *Gerhard* indicates the expenses would probably be deductible.

6. A, an engineer, becomes dissatisfied with his present employment and incurs expenses on his own to obtain a new position. Unlike 5, A is unsuccessful.

BEFORE PRIMUTH—the expenses are clearly non-deductible as expenses incurred in seeking employment.

118. David J. Primuth, 54 T.C. 374 (1970); Guy Motto, 54 T.C. 558 (1970); Kenneth Kenfield, 54 T.C. 1197 (1970); W. Richard Gerhard, P-H Tax Ct. Mem. 1970-262.

This view is also consistent with the treatment of education expenses. See Treas. Reg. § 1.162-5(b)(3) (1967) which provides: "In the case of an employee, a change of duties does not constitute a new trade or business if the new duties involve the same general type of work as involved in the individual's present employment."

AFTER PRIMUTH—although the taxpayer in *Gerhard* actually secured employment, it would seem once the court has allowed expenses to be deducted, the same rationale that ended the distinction between “fees paid in securing” and “fees paid in seeking” would apply in this instance. Therefore, A’s expenses are arguably deductible regardless of his success in attaining a new position.

B. Taxpayer Entering a Trade or Business

1. A, a recent law school graduate, after passing the bar exam, engages an employment agency to find him a job. The agency is successful and A accepts a new position with X law firm.

BEFORE PRIMUTH—A’s expenses (provided the fees are paid on a contingent basis) were covered under Rev. Rul. 60-223 and therefore deductible.

AFTER PRIMUTH—the result would depend upon the determination of when A’s trade or business of being a lawyer began. If A is considered to be a lawyer upon passing the bar exam the expenses would be deductible; if not, the result is then questionable. So long as Rev. Rul. 60-223 is in effect, however, even if the expenses do not come within the *Primuth* requirements, the expenses would be deductible.

2. A, a recent law school graduate, after passing the bar exam engages an employment agency to find him a job. The agency is successful and A accepts a position with X Company (not requiring legal duties).

BEFORE PRIMUTH—the expenses would be deductible under Rev. Rul. 60-223.

AFTER PRIMUTH—unless the rationale of applying fees paid in securing employment to the taxpayer’s new trade or business is used, it would be difficult to allow the deduction under the *Primuth* requirement. As in 1, however, the expenses might still be deductible depending on the status of Rev. Rul. 60-223.

3. A is discharged from the military service in July, 1970, and incurs expenses to obtain employment (employment agency fees and individual expenses). A obtains employment in March 1971 as a salesman with X company. A, in his 1970 income tax return, attempts to deduct expenses incurred in seeking employment during July-December of 1970.

BEFORE PRIMUTH—A’s expenses are for seeking employment and not deductible.

AFTER PRIMUTH—A’s expenses would also probably not be deductible. The reason, however, is that even though they are business in nature they are not incurred in an existing trade or business.

V. CONCLUSION

Prior to *Primuth*, courts restrictively viewed an employee's trade or business. The *employee's* trade or business was defined in relation to the *employer's* activities; therefore, the trade or business terminated when the employment relationship ended. This restrictive view complemented the Service's position that expenses incurred in seeking employment were personal.

The *Primuth* court, by viewing the employee's trade or business in relation to the employee's activities, gave an independent business status to the employee.¹¹⁹ In so doing, it also recognized the possibility of seeking employment within a trade or business. This position forced the court to then analyze the expenses involved as it would any other expenses incurred in carrying on a trade or business.

Although this presents a rational approach to the controversy, it is still possible that the court would balk at giving blanket approval to all employment seeking expenses. The requirement of actually obtaining a position would serve as a clear indication that the expenses were in fact business in nature.¹²⁰ This requirement would be for administrative convenience, however, and should be recognized as such.

It would seem that an inquiry into the actual expenses would provide a means of determining if they were of a business nature. Certain expenses (employment agency fees, resumés, etc.) are pure business expenses.¹²¹ Other expenses such as transportation, lodging, meals, etc. would present a more difficult problem, but the problem is not a new one and has been before the court numerous times. In the words of Judge Tannenwald in his concurring opinion to *Primuth*:

I am not concerned that such a test will open up a Pandora's box of unjustified deductions. The courts are not wanting in capability of separating the wheat from chaff and, at the same time, exhibiting sufficient flexibility not to proliferate taxpayers' difficulties unnecessarily. Such a task is simply a normal attribute of judicial life.¹²²

119. Maurice Artstein, P-H Tax Ct. Mem. 1970-220.

120. A similar position is taken in the field of investigation expenses by requiring actual entry into a business and later abandonment (Rev. Rul. 418, 1957-2 CUM. BULL. 143).

121. 54 T.C. at 379.

122. *Id.* at 382.

