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Taxpayers Stripped of Clothing Deductions by an Objective Standard

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Taxpayers Stripped of Clothing Deductions by an Objective Standard

In *Pevsner v. Commissioner*,[1] the Fifth Circuit Court of Appeals held that the purchase price of expensive designer clothing was not deductible as an "ordinary and necessary" business expense of a boutique manager, even though the clothing was to be worn only at the boutique. With this holding, the court adopted an objective standard for determining adaptability of work clothing to general use.

Ms. Sandra Pevsner was the manager of a boutique that sold only women's clothes and accessories designed by Yves St. Laurent (YSL).[2] The apparel was very expensive, and Pevsner was required by her employer to purchase and wear the clothing,[3] primarily to promote sales of the clothing.[4] During 1975, Pevsner bought several items of clothing,[5] for which she paid approximately $1380.[6] On her 1975 tax return she deducted a portion of that amount.[7] When the Commissioner denied the deduction, Pevsner petitioned the Tax Court seeking deduction of the full $1380.[8] The Tax Court allowed the deduction[9] as an ordinary and necessary business expense.[10] The Commissioner appealed that ruling and the Fifth Circuit reversed.[11]

The crucial issue in *Pevsner* was, of course, whether the expenses for the YSL clothing were to be treated, for tax purposes, as business ex-

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1. 628 F.2d 467 (5th Cir. 1980).
2. *Id.* at 468.
3. *Id.* at 468-69.
4. *Id.*
5. The items included: four blouses, three skirts, one pair of slacks, one trench coat, two sweaters, one jacket, one tunic, five scarves, six belts, two pairs of shoes and four necklaces. 628 F.2d at 429. For various reasons, Ms. Pevsner did not wear the clothing during off-work hours. Her husband was partially disabled because of a severe heart attack in 1971. They led a simple life with very limited and informal social activities. Pevsner stated that the clothes were too expensive for her simple everyday lifestyle. In addition, she did not wear the clothes apart from work so they would last longer. *Id.*
6. 628 F.2d at 429.
7. *Id.*
8. Pevsner v. Commissioner, 38 T.C.M. 1210, *rev'd*, 628 F.2d 467 (1980).
9. 38 T.C.M. at 1213.
10. *Id.* at 1212. The Tax Court apparently felt that its earlier ruling in Yeomans v. Commissioner, 30 T.C. 757 (1958) was categorically dispositive of *Pevsner*.
11. 628 F.2d at 471.

penses or personal expenses. The former characterization of the expenses would enable Pevsner to claim the purchase costs as a deduction,[12] while characterization as the latter would disallow any deduction.[13]

Clothing costs have generally been considered nondeductible personal expenses.[14] Courts have also denied a deduction for the cost of clothes even when it was shown that the clothes would not have been purchased "but for" the employment,[15] or when the clothes used at work were more expensive than everyday apparel.[16] However, deductions have been allowed for the cost of clothing useful only in the workplace.[17]

A three-pronged test is used to determine whether clothing expenses may be deducted as an ordinary and necessary business expense. First, the clothing must be required in the taxpayer's employment. Second, the clothing must not be suitable for general or personal wear. Finally, the clothing must not actually be worn for general or personal wear.[18] This test was used by both the Tax Court and the Fifth Circuit in *Pevsner*.[19] The Tax Court, however, allowed the clothing costs as a deduction[20] while the Fifth Circuit did not.[21]

The Commissioner conceded that Ms. Pevsner was required by her employer to wear YSL clothing and that she did not wear the apparel away from work.[22] Since the first and third prongs of the test were satisfied by the Commissioner's stipulation, the only remaining issue was whether the clothing was adaptable to general usage as ordinary clothing.[23] However, courts have had much difficulty in implementing this phase of the three-step analysis.[24] The Tax Court has sometimes determined adaptability by looking to the personal lifestyle of the individual taxpayer under consid-

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12. I.R.C. § 162 (business deductions).

13. I.R.C. § 262 (personal expenses).

14. *See, e.g.*, Kennedy v. Commissioner, 39 T.C.M. (P-H) ¶ 70,058 (1970), *aff'd*, 451 F.2d 1023 (3d Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).

15. *See, e.g.*, Stiner v. United States, 524 F.2d 640 (10th Cir. 1975).

16. Drill v. Commissioner, 8 T.C. 902 (1947).

17. Mortrud v. Commissioner, 44 T.C. 208 (1965); Harsaghy v. Commissioner, 2 T.C. 484 (1943); Meier v. Commissioner 2 T.C. 458 (1943).

18. Donnelly v. Commissioner, 262 F.2d 411, 412 (2d Cir. 1959).

19. 38 T.C.M. at 1212; 628 F.2d at 469.

20. 38 T.C.M. at 1213.

21. 628 F.2d at 471.

22. *Id.* at 469-70.

23. *Id.* at 470.

24. This generalization does not apply to situations in which the taxpayer has purchased uniforms for work. It is fairly well-settled that the cost of a uniform is deductible as an ordinary and necessary business expense. *See* Commissioner v. Benson, 146 F.2d 191 (9th Cir. 1944); Meier v. Commissioner, 2 T.C. 458 (1943); Harsaghy v. Commissioner, 2 T.C. 484 (1943). The confusion in determining adaptability has arisen primarily when ordinary street clothing was bought for use at the workplace.

eration.[25] At other times, the Tax Court, along with other tribunals, has simply made an objective determination of whether the clothing was adaptable.[26]

In *Yeomans v. Commissioner*,[27] the Tax Court applied a subjective test for determining the adaptability of clothing. The taxpayer was a fashion coordinator for her employer. As part of her job, she was required to attend many meetings on behalf of her employer. It was customary for those in attendance at these meetings to dress according to the most advanced styles. To dress otherwise would have reflected unfavorably upon her employer. For her personal wear, however, the taxpayer preferred plainer, more conservative dress. The Tax Court, in considering the question of adaptability to personal use, recognized that the relevant clothing "was new and ultra in style and design, and was such as might be sought after and worn for personal use *by women who make it a practice* to dress according to the most advanced or extreme fashions."[28] The court also noted that some of the items worn by the taxayer were "items which were not suited for *her* private or personal wear, as distinguished from business wear. . . ."[29] Consequently, the court held that the expenses for the described clothing were allowable as an "ordinary and necessary" business expense deduction.[30]

Over the years, however, the Tax Court has experienced problems when attempting to apply the subjective standard illustrated in *Yeomans*. One problem has been that the Tax Court has not used consistent language when addressing the question of adaptability from a subjective perspective. For example, at least one Tax Court case enunciated the test by stating that the clothing must not be suitable for *personal* use.[31] Another decision stated that the clothing must not be suitable for *general or personal* use.[32] Still another case announced the standard as being whether the clothing is adaptable to *general usage as ordinary clothing*.[33] The semantic variations, although not grossly disparate, are still enough to

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25. Sharon v. Commissioner, 66 T.C. 515 (1976); Yeomans v. Commissioner, 30 T.C. 757 (1958); Fisher v. Commissioner, 23 T.C. 218 (1954).

26. Donnelly v. Commissioner, 262 F.2d 411 (2d Cir. 1959); Roth v. Commissioner, 17 T.C. 1450 (1952); Drill v. Commissioner, 8 T.C. 902 (1947).

27. 30 T.C. 757 (1958).

28. *Id.* at 768 (emphasis added).

29. *Id.* (emphasis added). The court seemed to be looking at Yeomans' personal need for the clothing rather than whether the clothing could be used for general use by an "objective" person.

30. *Id.*

31. Carroll v. Commissioner, 51 T.C. 215 (1968).

32. Jackson v. Commissioner, 39 T.C.M. (P-H) ¶70,227 (1970).

33. Sanner v. Commissioner, 38 T.C.M. (P-H) ¶69,084 (1969).

cast doubt on the exact standard being followed by the court.[34]

A second problem is that some Tax Court decisions which attempted to judge adaptability from a subjective posture, made it virtually impossible to discern the factors forming the basis of their conclusions. An illustration is one case in which the court stated that "where there is a mixture of personal and business considerations" a balancing and weighing of *all facts* is required so that they may be given proper importance.[35] In another case, the court stated that the question of adaptability is determined as follows:

> when the item is one which might be used by some individual as ordinary dress, and worn in lieu of other clothing, *we must determine from the facts if in fact the item was so connected with the taxpayers business* as to be a proper deduction for a business expense.[36]

In essence, these applications of subjective analysis did not set forth the specific factors considered vital to the determination of adaptability.[37]

An alternative to the subjective method of deciding adaptability, as used in *Yeomans,* is an objective approach. The Tax Court used this approach in *Drill v. Commissioner.*[38] In *Drill,* the taxpayer was employed as an outside superintendent and utility man for a general contractor. Since the taxpayer's work was hazardous at times, his clothing was often soiled with plaster, cement, oil or grease, and was sometimes torn or snagged. On the adaptability question, the court held that the clothing was of a kind adaptable to be worn generally, away from work as well as at work, even though *"as a matter of personal taste he would not want to wear it in social pursuits."*[39]

Donnelly v. Commissioner[40] represents another case in which the objective standard for determining adaptability was applied. In *Donelly,* the Second Circuit Court of Appeals affirmed a Tax Court finding that the clothing in question was adaptable to general usage.[41] The taxpayer was

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34. Indeed, under the separate wordings expressed in these three cases, it is difficult to determine whether the test is one of individual general usage or objective general usage. The different wording may simply be due to the fact that the Tax Court, having 13 judges, often makes its decisions in panels. Therefore, having no en banc decision to use for guidance, each panel simply used its own wording. Regardless of the reason for the language variation, the resulting confusion was the same.

35. Sharon v. Commissioner, 66 T.C. 515 (1976) (emphasis added).

36. Fryer v. Commissioner, 43 T.C.M. (P-H) ¶74,077 (1974) (emphasis added).

37. *Id.* Although the vague considerations mentioned in some cases are confusing, some courts simply state conclusions without revealing any factors on which their conclusions rest. *See, e.g.,* Mortrud v. Commissioner, 44 T.C. 208 (1965).

38. 8 T.C. 902 (1947).

39. *Id.* at 904 (emphasis added).

40. 28 T.C. 1278, *aff'd,* 262 F.2d 411 (1959).

41. 262 F.2d at 412.

employed in a plastics plant. His work was hard on clothes and he wore heavy-duty work clothes while on the job. The court determined that the work clothes were adaptable to wear away from work, even though the clothing was worn out prematurely by the process and the rough materials used in the taxpayer's work.[42]

For some time, then, two different standards existed for determining adaptability of work clothing to general usage, one subjective and the other objective. In *Pevsner*, the court of appeals was confronted with the question of which standard to adopt. Prior to deciding this issue, the Fifth Circuit reviewed the Tax Court's treatment of *Pevsner*. The Tax Court felt that the second prong qualification of "suitable for general or personal wear" was to be judged subjectively, in light of the taxpayer's personal lifestyle.[43] Pevsner's clothing expenses were classified as deductible by the Tax Court because that court apparently felt the wearing of YSL apparel during off-work hours would be inconsistent with Ms. Pevsner's lifestyle.[44] Probing for the reasoning of the Tax Court, the court of appeals noted that the basis had been heavy reliance on the earlier Tax Court decision in *Yeomans*.[45]

After reviewing the Tax Court's treatment of *Pevsner*, the Fifth Circuit stated that other circuits which had addressed the question of clothing adaptability had taken an objective rather than subjective approach.[46] In support of this statement, the court simply cited *Donnelly* and one other appellate decision.[47]

Moreover, the Fifth Circuit asserted two basic reasons in support of an objective test. The first of these was administrative convenience.[48] On this point the court stated that:

> [a]n objective test, although not perfect, provides a practical administra-

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42. 28 T.C. at 1280. In a sharp dissent to the Second Circuit's decision, Judge Hand argued that the deduction should be allowed and that disallowance of it was "an entirely arbitrary and capricious" line to draw. 262 F.2d at 413. Judge Hand, however, did not specifically address the adaptability question.

43. 628 F.2d at 470.

44. *Id.*

45. *Id.* In fact, the appellate court extracted a passage from the Tax Court opinion which stated that "*Yeomans* clearly decides the issue before us in favor of the petitioner." *Id.*

46. *Id.* Attempting to explain the objective approach, the court stated that "no reference is made to the individual taxpayer's lifestyle or personal taste." Instead, proposed the court, adaptability for personal use depended upon what was generally accepted for ordinary streetwear. *Id.*

47. *Id.* The other appellate decision referred to by the court was Stiner v. United States, 524 F.2d 640 (10th Cir. 1975). The court also cited Drill v. Commissioner, 8 T.C. 902 (1947) in support of this proposition. Only the appellate decisions, however, seem pertinent to this proposition.

48. 628 F.2d at 470.

> tive approach that allows a taxpayer or revenue agent to look only to objective facts in determining whether clothing required as a condition of employment is adaptable to general use as ordinary streetwear. Conversely, the tax court's reliance on subjective factors provides no concrete guidelines in determining the deductibility of clothing purchased as a condition of employment.[49]

The court apparently agreed with the Commissioner's contentions that: (1) as a practical matter, it is virtually impossible to determine the point at which either price of style or clothing is inconsistent with a taxpayer's lifestyle, and (2) the styles and prices of clothing one selects are inherently personal choices governed by taste, fashion and other unmeasurable values.[50]

A second reason advanced by the court to support an objective standard was that this test would "promote substantial fairness among the greatest number of taxpayers."[51] The court, by assuming this position, was apparently unwilling to subject two taxpayers with identical wardrobes to disparate tax consequences depending on the particular taxpayer's lifestyle and "socio-economic level."[52] Such a result, the Fifth Circuit stated, was not "consonant with a resonable interpretation of sections 162 and 262" of the I.R.C.[53]

The objective test adopted by the Fifth Circuit can obviously lead to harsh results on individual taxpayers, as is reflected in *Pevsner*. Indeed, if anyone deserved a deduction for work clothing, Ms. Pevsner was that person. She clearly had no use for the YSL clothing required by her employer. Her husband's partial disability virtually guaranteed that her lifestyle was, and would continue to be, simple with a very limited and informal social calendar. In fact, a deduction for Ms. Pevsner would be more justified than the deduction allowed by the Tax Court in *Yeomans*. In that case, the taxpayer simply *preferred* a plainer style of dress.[54] In *Pevsner*, however, the taxpayer's off-work style of dress was seemingly dictated to her by extrinsic factors, regardless of her personal preference.

Although Ms. Pevsner had a plausible argument that her YSL clothing was not adaptable based on the rationale of *Yeomans*,[55] the Fifth Circuit, by opting for an objective test, chose the most practical means of determining adaptability of clothing. The administrative convenience justifica-

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49. *Id.*
50. *Id.*
51. *Id.* at 471.
52. *Id.*
53. *Id.* at 471.
54. 30 T.C. at 760.
55. The argument seemed particularly strong in light of the Commissioner's acquiescence in the *Yeomans* decision. 1959-1 C.B. 5.

tion proffered by the court was its most sound argument.[56] In adopting the objective standard, the appellate court avoided the problems that had plagued the Tax Court when it had attempted to apply the subjective test.[57] Furthermore, by electing the objective standard, the court foreclosed the propsect of obtaining judicial sanction in the Fifth Circuit of a deduction for work clothing; at least when the deduction turns on adaptability of the clothing to general usage.

THOMAS DANIEL BRANNAN

56. 628 F.2d at 470. *See* Donnelly v. Commissioner, 262 F.2d 411, 412 (2d Cir. 1959). Although the statement that other circuits had adopted an objective standard may be true, it is not enough, standing alone, to support the adoption of an objective test by the Fifth Circuit. In fact, one of the circuit cases on which the court in *Pevsner* relied did very little to support the proposition. *See* Stiner v. United States, 524 F.2d 640 (10th Cir. 1975).

57. *See* notes 32-38 *supra*, and accompanying text for illustrations of the various problems encountered by the Tax Court.