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Tax Law: I.R.C. Section 280A — Business Use of a Personal Residence — The Supreme Court's Latest Decision Bringing the House Down on Home Office Deductions — A Purely Revenue Producing Decision

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CASENOTES

TAX LAW: I.R.C. SECTION 280A — BUSINESS USE OF A PERSONAL RESIDENCE — THE SUPREME COURT'S LATEST DECISION BRINGING THE HOUSE DOWN ON HOME OFFICE DEDUCTIONS — A PURELY REVENUE PRODUCING DECISION — *Soliman v. Commissioner*, 94 T.C. 20 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

I. INTRODUCTION

In the Tax Reform Act of 1976, Congress severely restricted the deductibility of expenses attributable to the business use of real property.[1] Prior to the enactment of section 280A of the Internal Revenue Code,[2] a taxpayer was caught between the liberal position of the Tax Court and the restrictive position of the Internal Revenue Service (IRS). Congress enacted section 280A[3] of the Internal Revenue Code in order to remedy the conflict between the IRS and the Tax Court.[4] This conflict concerned the deductibility of expenses that the taxpayer deducted as business expenses and expenses that the IRS disallowed as personal expenses.

Section 280A disallows the deduction of expenses attributable to that portion of a taxpayer's residence which is used to conduct his or her business.[5] It allows a deduction for expenses incurred in connection with maintaining a home office if the taxpayer meets the requirements

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1. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1569.
2. See *infra* notes 14-53 and accompanying text for a discussion of the history of I.R.C. § 280A.
3. I.R.C. § 280A (1988).
4. See *infra* notes 14-53 and accompanying text for a discussion of the history of I.R.C. § 280A.
5. I.R.C § 280A(a). Section 280A(a) states:

> Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

Id. See *infra* notes 58-69 and accompanying text for a discussion of I.R.C. § 280A(a) and I.R.C. § 280A(c).

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of subsection (c) of section 280A[6] and the amounts in question do not exceed the statutory limitation.[7]

This Casenote reviews the Supreme Court's recent decision in *Soliman v. Commissioner*.[8] In *Soliman*, the Supreme Court adopted its own two-part test of "function and time" in determining the taxpayer's principal place of business for purposes of section 280A(c)(1)(A).[9] In adopting this test, the Court rejected both the more liberal "facts and circumstances"[10] test and the more narrow "focal point"[11] test. In its analysis, the *Soliman* Court posited the following criteria for determining the principal place of business under section 280A(c)(1)(A): "[1] the relative importance of the activities performed at each business location and [2] the time spent at each place."[12]

This Casenote argues that the "facts and circumstances" test abrogates both the "focal point" test and the "function and time" test. This Casenote also discusses the weaknesses of the "focal point" test

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6. I.R.C. § 280A(c)(1). This section provides:

> Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis-
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> (A) [as] the principal place of business for any trade or business of the taxpayer,
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> (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
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> (C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

Id. Subsection (a) qualifies these exceptions by stating that: "[i]n the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer." *Id.* at § 280(a).

7. *Id.* at § 280A(c)(5). In pertinent part, this section provides:

> [T]he deductions allowed under this chapter for the taxable year by reason of being attributed to such use shall not exceed the excess of-
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> (A) the gross income derived from such use for the taxable year, over
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> (B) the sum of-
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> (i) the deductions allocable to such use which are allowable under this chapter for the taxable year whether or not such unit (or portion thereof) was so used, and
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> (ii) the deductions allocable to the trade or business (or rental activity) in which such use occurs . . . for such taxable year.

Id.

8. 94 T.C. 20 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

9. *Id.*

10. See *infra* notes 190-274 and accompanying text for a discussion of the facts and holdings of *Soliman*.

11. See *infra* notes 83-135 and accompanying text for a discussion of the development of the "focal point" test.

12. *Soliman*, 113 S. Ct. 701, 706 (interim ed. 1993). Both the Tax Court and the Fourth Circuit utilized the following criteria in determining whether the taxpayer's home office was his principal place of business for purposes of § 280A(c)(1)(A): (1) the taxpayer's home office must be essential to the taxpayer's business; (2) the taxpayer must spend a substantial amount of time in the home office; and (3) the taxpayer must not have another place available in which to perform the office functions of the business. *See Soliman*, 94 T.C. at 29, *aff'd*, 935 F.2d at 54.

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and the "function and time" test, while at the same time demonstrating the validity of the "facts and circumstances" test. Part II of this Casenote examines the historical development of section 280A. Part III discusses the facts and holding of *Soliman v. Commissioner*, including the Tax Court's initial holding, the Fourth Circuit's decision affirming the Tax Court's holding, and the subsequent reversal of the Fourth Circuit by the United States Supreme Court. Part IV then analyzes the "facts and circumstances" test as articulated by the Tax Court as well as by the Fourth Circuit. Part IV also analyzes the Commissioner's "loophole" theory as well as the overall weakness of the "focal point" test. Finally, Part IV analyzes the weaknesses of the Supreme Court's "function and time" test. This Casenote then concludes by demonstrating that the "facts and circumstances" test's expansion of section 280A(c)(1)(A) is consistent with both the language and the historical development of section 280A.[13]

II. BACKGROUND

Prior to the enactment of section 280A, there was a great deal of confusion on the part of the IRS and taxpayers in their attempts to distinguish between nondeductible living expenses and deductible business expenses. In an attempt to remedy this confusion, the IRS issued Revenue Ruling 62-180.[14] The Tax Court, however, declined to implement this ruling. Instead, the Tax Court adopted an "appropriate and helpful" standard for determining the deductibility of these expenses. This confusion between the IRS, taxpayers, and the Tax Court prompted Congress to enact section 280A.

A. The Appropriate and Helpful Test

Prior to the enactment of Section 280A, the deductibility of expenses attributable to a home office was controlled by sections 162(a) and 262(a) of the Internal Revenue Code. Section 162(a) allows a deduction for "all the ordinary and necessary expenses paid or incurred

13. For a further discussion of the home office deduction, see generally, John O. Everett, *Home Office Expense Deductions: More Trouble Than They Are Worth*, 58 TAXES 589 (1980); Neil M. Goff, Comment, *Commingling Business and Personal Use of Real Property: Severe Restrictions Under The 1976 Tax Reform Act*, 13 GONZ. L. REV. 493 (1978); Michael B. Lang, *When a Home is Not Entirely a Home: Deductions Under Internal Revenue Code § 280A for Home Offices, Vacation Homes, Etc.*, UTAH L. REV. 275 (1981); Timothy M. Mulligan, *The Tax Ramifications of the Business Use of a Home*, 15 LINCOLN L. REV. 87 (1984); Burke T. Ward, *Home Office Deductions: The Development and Current Status of Section 280A(c)(1)(A)*, 13 CUMB. L. REV. 195 (1982-83); Note, *Home Office Deductions: May a Taxpayer Have More Than One Principal Place of Business*, 79 MICH. L. REV. 1607 (1981).

14. Rev. Rul. 62-180, 1962-2 C.B. 52. *See infra* notes 18-23 and accompanying text.

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. . . in carrying on a trade or business . . . ."[15] The United States Supreme Court has defined "ordinary and necessary" expenses as those expenses which are "appropriate and helpful" in carrying on the taxpayer's trade or business.[16] Section 262(a) provides that "[e]xcept as otherwise provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."[17] The conflict between taxpayers and the IRS arose with respect to the identification of expenses deductible under section 162(a) because these expenses both were ordinary and necessary business expenses and expenditures which were not deductible under section 262(a).

In 1962, the IRS attempted to resolve the home office deduction conflict by issuing Revenue Ruling 62-180.[18] This ruling greatly reduced the accessibility of a home office deduction. Moreover, this ruling limited the amount of the deduction.[19] The ruling stated:

> An employee who, as a condition of his employment, is required to provide his own space and facilities for performance of his duties and regularly uses a portion of his personal residence for that purpose may deduct a pro rata portion of the expenses of maintenance and depreciation on his residence.
>
> The burden of proof rests upon the taxpayer to establish (1) that, as a condition of employment, he is required to provide his own space and facilities for performance of some of his duties, (2) that he regularly uses part of his personal residence for that purpose, (3) the portion of his personal residence which is so used, (4) the extent of such use, and (5) the pro rata portion of the depreciation and expenses for maintaining his residence which is properly attributable to such use.[20]

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15. I.R.C. § 162(a) (1988).

16. Welch v. Helvering, 290 U.S. 111, 113 (1933). The *Welch* Court stated:

> We may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner's business, at least in the sense that they were appropriate and helpful. . . . Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. . . . Unless we can say from facts within our knowledge that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in the business world, the tax must be confirmed.

Id. at 113-15.

17. I.R.C. § 262(a) (1988). For specific exceptions to § 262, see generally, I.R.C. § 163 (1988) (exception for payment of certain interest); I.R.C. § 164 (1988) (deduction for state and local taxes paid); I.R.C. § 165 (1988) (casualty losses); I.R.C. § 170 (1988) (deduction for contributions made to charitable organizations); I.R.C. § 213 (1988) (deduction for medical expenses).

18. Rev. Rul. 62-180, 1962-2 C.B. 52.

19. *Id.* at 52-53.

20. *Id.*

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This ruling was very restrictive in that it allowed a deduction only when the home office was kept as a condition of employment.[21] For instance, when the residence was used for business purposes only part of the time, the ruling required that a "pro rata" allocation be made "on the basis of the ratio of the time the area [was] actually used for business purposes to the total time it [was] available for *all* uses."[22] The use of this type of ratio greatly reduced the amount of the deduction in comparison with other allocation ratios.[23]

The Tax Court initially upheld the restrictive position of Revenue Ruling 62-180.[24] The ruling, however, did not have continued success in subsequent cases. In *Bischoff v. Commissioner*,[25] for example, the taxpayer was an executive who worked as a commercial artist in a New York City advertising agency.[26] Although the taxpayer was not required to maintain an office in his home, he did so in order to meet his deadlines.[27] The Tax Court allowed the deduction because the expenditures were "appropriate and helpful" in the conduct of the taxpayer's business.[28] The court further stated that "to be deductible as an ordinary and necessary business expense, it is sufficient that the expenditure be 'appropriate and helpful' to the conduct of the business; it need not be required."[29]

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21. *Id.*

22. *Id.* at 54 (emphasis added). This allocation is subsequent to an allocation based on either floor space or the number of rooms.

23. Some other ratio methods include allocating on the basis of floor space (the square footage of the home office as compared to the entire structure) and allocating on the basis of the number of rooms in the structure. These allocation methods do not take into account the amount of time spent in the home office. *See* Sharp v. United States, 199 F. Supp. 743 (D. Del. 1961), *aff'd*, 303 F.2d 783 (3d Cir. 1962). In *Sharp*, the petitioners used an airplane for business uses twenty-five percent of the time and personal uses seventy-five percent of the time. *Id.* at 744. The court allocated the depreciation on the basis of this ratio rather than on the basis of the time the airplane was available for all use. *Id.* at 747.

24. Davis v. Commissioner, 38 T.C. 175, 179-80 (1962). In *Davis*, the taxpayer, a teacher, built a room over the garage next to his home. *Id.* at 177. The taxpayer used this study to prepare lectures, to grade examinations, and occasionally for student conferences. *Id.* The taxpayer was not required by his employer to do work at home. *Id.* In disallowing the deduction, the Tax Court reasoned that the expenses associated with the home were not ordinary and necessary business expenses under § 162(a) because the taxpayer had an office at his employer's place of business. *Id.* at 177, 179-80.

25. 25 T.C.M. (CCH) 538 (1966).

26. *Id.* at 538.

27. *Id.* at 539. The taxpayer's job was such that he frequently was required to meet deadlines that could not be accomplished unless he worked overtime. Therefore, he maintained a studio at his home. The taxpayer also demonstrated the difficulties he had experienced in obtaining air conditioning in the summer and heat in the winter at work. Therefore, it was unfavorable for the taxpayer to use the office his employer furnished. *Id.* at 538-539.

28. *Id.* at 539.

29. *Id.*; *see also* Peiss v. Commissioner, 40 T.C. 78 (1963) (deduction allowed under the "appropriate and helpful" standard).

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The Tax Court's decision in *Newi v. Commissioner*[30] further rejected the condition of employment standard the IRS had articulated in Revenue Ruling 62-180. The plaintiff in *Newi*, George H. Newi, was employed as an outside salesman of television time by the American Broadcasting Company (ABC).[31] Newi maintained a home office even though ABC provided him adequate facilities and the maintenance of the home office was not a condition of his employment.[32] On average, Newi spent three hours a night in his home office reviewing his notes, studying research materials, making plans for the next day, and viewing advertisements of ABC and its competitors.[33] The Tax Court allowed the deduction. The *Newi* court rejected the "required by the employer"[34] standard urged by the IRS and focused on the "appropriate and helpful" standard[35] suggested by the taxpayer.[36] The Second Circuit Court of Appeals affirmed the Tax Court's use of the "appropriate and helpful" standard despite the Commissioner's concerns.[37] The Commissioner argued that this decision "would open the doors for a business deduction to any employee who would voluntarily choose to engage in an activity at home which conceivably could be helpful to his employer's business."[38]

Subsequent to the *Bischoff* and *Newi* decisions, the IRS experienced difficulty in determining which expenses were "appropriate and helpful" to the taxpayer's business and which expenses were within the

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30. 28 T.C.M. (CCH) 686 (1969), *aff'd*, 432 F.2d 998 (2d Cir. 1970).

31. *Newi*, 432 F.2d at 999.

32. *Id.*

33. *Id.* The study was not used by the taxpayer or his wife for personal entertainment or personal television viewing. *Id.*

34. *Id.* The IRS took the position that the expenses attributable to a home office were deductible only if the home office was a condition of employment. *See* Rev. Rul. 62-180, 1962-2 C.B. 52, 52-53.

35. *Newi*, 432 F.2d at 1000. Newi argued that as long as the expenses attributable to the home office were "appropriate and helpful" the expenses are deductible under § 162(a). *Id.*

36. Newi v. Commissioner, 28 T.C.M. (CCH) 686, 691 (1969). In *Newi*, the Second Circuit adopted the "appropriate and helpful" standard and focused its attention on the feasibility of Newi returning to work.

> The Commissioner makes much of the fact that ABC did not require or request the Taxpayer to set aside a portion of his apartment for office work and that the ABC building was open in the evening with office space and television equipment available . . . . Assuming he could have obtained a taxi at that theater hour . . . he would have had to have crossed four or five main north and south arteries, each with traffic lights, proceeded for some distance . . . to a street which traversed Central Park and, thence, to his office. During this time he would have missed many of the programs which would have been of importance to him.

Newi, 432 F.2d at 999-1000.

37. *Id.* at 1000.

38. *Id.* The court stated that its opinion opened the doors long enough to enable this taxpayer to pass through and that it found the Commissioner's concerns baseless. *Id.*

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scope of section 262(a) as living expenses. In *Gino v. Commissioner*,[39] the Commissioner conceded that the expenses were deductible and sought to allocate the expenditures based upon a ratio of "the time the area [was] used for business purposes to the total time it [was] available for *all* uses."[40] The Tax Court reasoned that such a ratio was erroneous and unjust and held that the proper ratio compared the hours used for personal purposes to the total time the room was used.[41] The court stated that the Commissioner's ratio was erroneous because, when the room is unused, the area is just as much available for business use as it is for personal use.[42]

Although the Tax Court and the federal judiciary continually refused to follow the Commissioner's position as it was articulated in Revenue Ruling 62-180, the IRS continued to litigate its position and finally received a favorable decision from the Fourth Circuit Court of Appeals in *Bodzin v. Commissioner*.[43] In *Bodzin*, the Tax Court made the home office deduction more readily available to taxpayers.[44] The taxpayer in *Bodzin*, Stephen A. Bodzin, was employed as an attorney-advisor in the Interpretative Division of the IRS.[45] Bodzin deemed it desirable to work overtime despite not being "required, requested, expected, or encouraged" to do so.[46] The Commissioner argued, again in accordance with Revenue Ruling 62-180, that Bodzin was not entitled to a deduction because the maintenance of a home office was not a condition of his employment.[47] The Tax Court rejected this argument and allowed the deduction.[48] The Tax Court determined that "require"

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39. 60 T.C. 304 (1973), *rev'd*, 538 F.2d 833 (9th Cir.), *cert. denied*, 429 U.S. 979 (1976). In *Gino*, the petitioners, school teachers, used specific parts of their home for two hours a night, five nights a week for school related purposes. *Id.* at 311. The petitioners used these same parts of their home for personal use for six hours a night. *Id.* at 315. Both the petitioners and the IRS agreed that a deduction was allowed under § 162(a). *Id.* at 311, 313.

40. *Id.* at 314-15 (quoting Rev. Rul. 62-180, 1962-2 C.B. 52, 54) (emphasis added).

41. *Gino*, 60 T.C. at 314-15.

42. *Id.* at 315.

43. 60 T.C. 820 (1973), *rev'd*, 509 F.2d 679 (4th Cir.), *cert. denied*, 423 U.S. 825 (1975).

44. *Id.*

45. *Id.* at 821. The Interpretative Division prepares legal memoranda, press releases, and reviews and edits revenue rulings. The basic function of the Interpretive Division is to act as the attorney for the Commissioner of Internal Revenue. *Id.* The Interpretative Division of the IRS no longer exists. It is now part of the Chief Counsel's office.

46. *Id.* at 822. It was the policy of the Interpretative Division to complete its cases as quickly as possible. *Id.* The taxpayer was responsible for setting his own deadlines or target dates. *Id.*

47. *See id.* at 824-25.

48. *Id.* at 825. The *Bodzin* court further stated:

> [R]espondent attempts to rehabilitate Rev. Rul. 62-180 . . . which laid down guidelines for determining the deductibility of home office expenses and for figuring the amount of such expenses. . . . [O]ne requirement . . . [is that the taxpayer must be] required to provide his own space and facilities for performance . . . of his duties.

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does not mean "absolutely essential" or "absolutely necessary."[49] Instead, the Tax Court allowed the deduction because the maintenance of the home office was "appropriate and helpful."[50]

In reversing the Tax Court's decision, the Fourth Circuit concluded that the expenses were personal living expenses and that they were, therefore, not deductible under section 262(a) of the Internal Revenue Code.[51] The court explained that:

> Section 161 provides that deductions specified in Part VI of Subchapter B of the Income Tax Subtitle of the Code are "subject to the exceptions provided in part IX." The priority ordering directive of [section] 161 therefore requires, on the facts of this case, that the provision quoted from [section] 262 take precedence over the provision quoted from [section] 162(a).[52]

Consequently, it was unnecessary for the court to decide whether Bodzin's home office expenses were "appropriate and helpful."[53]

B. The Legislative Enactment of Section 280A

Due to the conflict between the IRS and the Tax Court, the House Ways and Means Committee and the Senate Finance Committee determined that "there [was] a great need for definitive rules" to resolve this conflict.[54] Both committees were also concerned with "the inherent administration problems" and the "necessarily . . . subjective determination" of the "appropriate and helpful" standard.[55] Most importantly, the committees believed that many nondeductible living expenses were being converted into deductible business expenses simply by applying

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. . . .

> In this case there is no question as to the good faith of the petitioner or the reasonableness of the amount. . . . It makes no difference that the petitioner was not required to maintain a home office, that he wanted merely to do a good job, and that he liked his work. The expenses were "necessary" because they were appropriate and helpful in the conduct of his business. They enabled him to keep a facility in his home wherein he could, and did, work.

Id. at 824-26.

49. *Id.* at 825.

50. *See id.*

51. *Bodzin v. Commissioner*, 509 F.2d 679, 681 (4th Cir. 1975).

52. *Id.* (quoting Commissioner v. Idaho Power Co., 418 U.S. 1, 17 (1971)).

53. *Id.*

54. H.R. REP. NO. 658, 94th Cong., 1st Sess. 1, 160 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3053-54; S. REP. NO. 938, 94th Cong., 2d Sess. 1, 147 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579-80.

55. H.R. REP. NO. 658, 94th Cong., 2d Sess. at 160 *reprinted in* 1976 U.S.C.C.A.N. at 3053-54; S. REP. NO. 938, 94th Cong., 2d Sess. at 147, *reprinted in* 1976 U.S.C.C.A.N. at 3579-80.

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the "appropriate and helpful" standard.[56] Both committees cited *Bodzin* and noted that "it is not clear which standard would be applied in the Fourth Circuit in a case in which the court found both personal and business use of a residence."[57]

As a part of the Tax Reform Act of 1976,[58] Congress enacted section 280A in order to alleviate problems surrounding the "subjective determination" of the deductibility of home office expenses. Generally, this section precludes a taxpayer from deducting expenses[59] attributable to the use of a residence for business purposes.[60] Section 280A(a) states:

> GENERAL RULE. - Except as otherwise provided in this section, in the case of a taxpayer who is an individual or a S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.[61]

A taxpayer must meet substantial requirements in order to overcome the general rule of section 280A(a). Section 280A(c), as it applies to home office deductions, states:

> (1) Certain Business Use- Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is *exclusively* used on a *regular* basis-
>
> (A) [as] the principal place of business for any trade or business of the taxpayer,
>
> (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
>
> (C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.[62]

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56. H.R. REP. NO. 658, 94th Cong., 2d Sess. at 160, *reprinted in* 1976 U.S.C.C.A.N. at 3053-54; S. REP. NO. 938, 94th Cong., 2d Sess. at 147, *reprinted in* 1976 U.S.C.C.A.N. at 3579-80.

57. H.R. REP. NO. 658, 94th Cong., 1st Sess. at 158, *reprinted in* 1976 U.S.C.C.A.N. at 3051-52; S. REP. NO. 938, 94th Cong., 2d Sess. at 145, *reprinted in* 1976 U.S.C.C.A.N. at 3577.

58. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1569-72 (1978).

59. I.R.C. § 280A(a) (1988). Section 280A provides that, notwithstanding the general preclusion of section 280A, business related deductions are permitted if such expenses are otherwise specifically permitted elsewhere in the Code. Examples of expenses for which a deduction is permitted are: (1) interest paid under section 163; (2) taxes paid under section 164; and (3) casualty loss incurred under section 165. I.R.C. § 280(A)(b) (1988).

60. This section also applies to individuals, trusts, estates, partnerships, and electing small business corporations. This section does not apply to Subchapter C corporations. *See* H.R. REP. NO. 658, 94th Cong., 1st Sess. at 160, *reprinted in* 1976 U.S.C.C.A.N. at 3050; S. REP. NO. 938, 94th Cong., 2d Sess. at 147, *reprinted in* 1976 U.S.C.C.A.N. at 3579.

61. I.R.C. § 280A(a) (1992).

62. *Id.* at § 280A(c)(1)(A)-(C) (emphasis added).

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In addition to meeting the above requirements, a deduction for home office expenses will only be allowed in the case of an employee if the home office is kept for the convenience of the taxpayer's employer.[63] There is, however, an exception to the "exclusive use" test.[64] This exception involves a taxpayer whose trade or business is selling retail products and whose dwelling unit is the *sole fixed location* of the business.[65] The availability of this exception is conditioned upon the fact that the unit is used regularly as a storage unit for inventory used in the taxpayer's trade or business.

Even if the requirements of section 280A(c)(1) are met, the taxpayer is still subject to an overall limitation on the amount of the home office deduction.[66] The allowable deduction may not exceed the gross income "derived from the use of the residence . . . reduced by the deductions which are allowed without regard to the connection with the taxpayer's trade or business (e.g., interest and taxes)."[67] When a taxpayer uses a residence or a separate structure for business purposes as well as another facility for business purposes, "a reasonable allocation (*based on the facts and circumstances of each case*) is to be made to determine that portion of the gross income derived from the business use of the residence . . . ."[68] If a taxpayer is subject to the limitation,

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63. *Id.* § 280A(c)(1).

64. *Id.* § 280A(c)(2).

65. *Id.* (emphasis added). This section states:

> (2) Certain Storage Use. - Subsection (a) shall not apply to any item to the extent such item is allocable to space within the dwelling unit which is used on a regular basis as a storage unit for the inventory of the taxpayer held for use in the taxpayer's trade or business of selling products at retail or wholesale, but only if the dwelling unit is the sole fixed location for such trade or business.

Id.; *see* Garvey v. Commissioner, 43 T.C.M. (CCH) 1003 (1982); *see also* H.R. REP. NO. 658, 94th Cong., 1st Sess. 1, 161 (1975), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3580; S. REP. NO. 938, 94th Cong., 2d Sess. 1, 148 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3580.

66. I.R.C § 280A(c)(5) (1988).

67. S. REP. NO. 938, 94th Cong., 2d Sess. at 149, *reprinted in* 1976 U.S.C.C.A.N. at 3581. Consider this hypothetical: A taxpayer has gross income of $3,000 attributable to the home office. The taxpayer also has mortgage interest of $800 and real estate taxes of $650 allocable to the home office. The mortgage interest and real estate taxes are deductible on Schedule A as itemized deductions without regard to the taxpayer's business. Therefore, the deduction may not exceed $1550. This is the gross income ($3000) reduced by mortgage interest ($800) and real estate taxes ($650). The other expenses, including maintenance, utilities, and depreciation, are limited to $1550.

68. *Id.* (emphasis added). The report further states:

> With respect to the deductions which are allocable to the trade or business use of the residence or separate unattached structure, deductions allowable without regard to whether the activity is a trade or business are to be deducted first. Any remaining gross income may then be reduced (but not below zero) by the remaining allowable deductions which are allocable to such use.

Id.

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section 280A(c)(5)(ii) allows the taxpayer to carry forward the nondeductible expenses to the succeeding taxable year.[69]

1. The Requirement of Exclusive Use

To be subject to one of the exceptions of section 280A(c)(1), the taxpayer must use the business portion of the dwelling unit exclusively for business purposes on a regular basis.[70] The committee report states that the business portion must be used solely for the purpose of carrying on the taxpayer's trade or business.[71] The use of a portion of the residence for both personal and business purposes will not satisfy the exclusivity requirement.[72] In *Chauls v. Commissioner*,[73] the petitioners, a husband and his wife, were music professors who converted a room of

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69. I.R.C. § 280A(c)(5)(B) (1988). This amount carried forward is subject to the same limitation whether or not the unit is used as a residence during the taxable year. *Id.*

The mechanics of section 280A(c)(5) are illustrated in the following situation. The taxpayer is a certified public accountant employed by a regional CPA firm as a tax manager. The taxpayer operates a separate business in which he refinishes furniture in his home. For this business, the taxpayer uses two rooms in the basement of his home exclusively and regularly. The floor space of the two rooms constitutes ten percent of the floor space of his residence. Gross income from the business totals $8,000. Expenses of the business (other than home office expenses) are $6,500. The following home office expenses are incurred:

Real Property taxes on residence		$4,000
Interest expense on residence		$7,500
Operating expenses of residence		$2,000
Depreciation on residence (based on 10% business use)		$250
The taxpayer's deductions are as follows:		
Business income		$8,000
Less: Other business expenses		<6,500>
Less: Allocable taxes ($4,000 x 10%)	$400	
Allocable interest ($7,500 x 10%)	$750	
Total allocable expenses		<1,150>
Remaining income subject to limitation		$350
Allocable operating expenses of the residence ($2,000 x 10%)		<200>
Allocable depreciation ($250, limited to remaining income)		<150>

The taxpayer has a carryover of $100 (the unused excess depreciation). HOFFMAN ET AL., WEST'S FEDERAL TAXATION: INDIVIDUAL INCOME TAXES 10-33 (1990). This amount will be carried over to the subsequent years. If, however, the gross income is reduced to zero before the taxpayer can use it in future years, it will be carried forward until such time as gross income exceeds the deduction by at least $100. *See* I.R.C. § 280(c)(5) (1988).

70. I.R.C. § 280A(c)(1) (1988).

71. H.R. REP. NO. 658, 94th Cong., 1st Sess. 1, 161 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3054.

72. *Id.* The report further states:

> Thus, for example, a taxpayer who uses a den in his dwelling unit to write legal briefs, prepare tax returns, or engage in similar activities as well as for personal purposes, will be denied a deduction for the expenses paid or incurred in connection with the use of the residence which are allocable to these activities.

Id.

73. 41 T.C.M. (CCH) 234 (1980); *see also* Weightman v. Commissioner, 42 T.C.M. (CCH) 104 (1981).

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their apartment into an office.[74] The room contained a desk, a telephone, a calculator, a chair, and a large number of books.[75] The court denied the deductions because the record showed that the room was also used for entertaining friends and for opening mail.[76]

2. The Requirement of Regular Use

In addition to the exclusivity requirement, the business portion of the dwelling unit must also be used on a "regular basis" in order to qualify for the deduction.[77] The legislative history clearly indicates that incidental or occasional use of the home office will not qualify as "regular use" and that the expenses attributable to the home office would, therefore, not be deductible.[78] The Tax Court considered this issue in *Jackson v. Commissioner*.[79] In *Jackson*, the petitioner took a deduction for the portion of her three bedroom apartment she used in her business.[80] The Tax Court upheld the disallowance of the deduction by the IRS.[81] The court concluded that the petitioner did not meet the "regular use" test of section 280A(c)(1).[82]

C. Development of the Focal Point Test

Section 280A(c)(1)(A) allows the taxpayer to deduct the expenses attributable to a home office used exclusively and regularly as the tax-

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74. *Chauls*, 41 T.C.M (CCH) at 234.

75. *Id.* at 234-235.

76. *Id.* at 236. In addition to its conclusion that the room was not being used exclusively for business purposes, the court also found that: (1) it was not the petitioner's principal place of business; (2) it was not a place where "patients, customers, or clients" met; and (3) the office was not kept for the convenience of the petitioner's employer. *Id.*

77. I.R.C. § 280A(c)(1) (1988).

78. S. REP. NO. 938, 94th Cong., 2d Sess. 1, 148-49 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3581. The report states that "[e]xpenses attributable to incidental or occasional trade or business use of an exclusive portion of a dwelling unit would not be deductible even if that portion of the dwelling unit is used for no other purpose." *Id.*

79. 76 T.C. 696 (1981).

80. *Id.* at 697. The petitioner, a licensed real estate salesperson, was associated with Walker & Lee, Inc., a licensed real estate broker. *Id.* Under California law, the petitioner was prohibited from setting up an office without the broker's supervision. *Id.* at 696-97.

81. *Id.* at 700-01.

82. *Id.* The *Jackson* court stated:

> Although some of petitioner's clients did visit her home office, petitioner indicated that clients did not ordinarily come to her home. Moreover, petitioner was unable to recall or estimate how many clients actually came to her home in 1976, and the record is not altogether clear as to the frequency and regularity of client visits that actually occurred. In light of the unsatisfactory state of the record . . . petitioner has not established that her home office was . . . regularly used for meeting clients . . . ."

Id.; *see also* Cristo v. Commissioner, 44 T.C.M. (CCH) 1057 (1982). In *Cristo*, the court stated that "[t]he record does not indicate . . . how often . . . interviews took place in the office room . . . nor does it indicate how often meetings about complaints took place in the office room . . . ." *Id.* at 1066. The deduction was disallowed because of the lack of information. *Id.*

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payer's principal place of business.[83] The Tax Court initially had difficulty in interpreting the scope of the principal place of business exception since the statute and the legislative history failed to provide any guidelines as to its determination.[84] The IRS interpreted the term to mean the place where most of the taxpayer's business occurs "regardless of the number of business activities in which the taxpayer may be engaged."[85] Under the proposed regulation, a taxpayer could be involved in many different trade or business activities.[86] The taxpayer, however, could only have one principal place of business for all of his or her activities.[87]

1. Curphey v. Commissioner

Curphey v. Commissioner[88] challenged the IRS's interpretation of section 280A(c)(1)(A). In *Curphey*, the petitioner was a dermatologist employed by a hospital who also owned and managed six rental properties.[89] The petitioner used one bedroom of his home exclusively as an office in which he kept "a desk, bookcase, a filing cabinet, calculators, and a 'code-a-phone answering service.' "[90] The IRS disallowed the deduction on the grounds that the taxpayer could only have had one principal place of business.[91] The IRS argued that, when a taxpayer is engaged in more than one business, a deduction will only be allowed when all of the businesses are considered together and the home office is determined to be the principal place of business.[92] The IRS also argued that this determination must be based upon the time spent at each place of business, the degree of business activity occurring at each

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83. I.R.C. § 280A(c)(1)(A) (1988); *see also* H.R. REP. NO. 658, 94th Cong., 1st Sess. 1, 161 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3054-55 (1976).

84. *See* Malat v. Riddell, 383 U.S. 569 (1966). The Supreme Court held that, under I.R.C. § 1221(1), the word primarily means "of first importance" or "principally." *Id.* at 572.

85. 45 Fed. Reg. 52,399, 52,403 (1980) (to be codified at Treas. Reg. § 1.280A) (proposed August 7, 1980). The proposed regulation states:

> For purposes of section 280A(c)(1)(A) . . . a taxpayer may have only one principal place of business regardless of the number of business activities in which the taxpayer may be engaged. When a taxpayer engages in business activities at more than one location, it is necessary to determine the principal place of business of the taxpayer's *overall* business activity *in light of all the facts and circumstances.*

Id. (emphasis added).

86. *Id.*

87. *Id.*

88. 73 T.C. 766 (1980).

89. *Id.* at 767-68.

90. *Id.* at 768.

91. *Id.* at 776.

92. *Id.*

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place of business, and the economic gain derived from the activity at each place of business.[93]

The IRS argued that the hospital was the petitioner's principal place of business because that was where he made the majority of his money and spent the majority of his time.[94] The Tax Court, however, concluded that the petitioner's home office was his principal place of business with respect to his real estate dealings.[95] The court stated that "section 280A(c)(1)(A) requires a determination as to whether, with respect to a particular business conducted by a taxpayer, the home office was his principal place of business for conducting that business."[96] The court believed that the IRS's "approach of requiring that the home office be the *principal place of business* at which the taxpayer's *principal* business is conducted would disallow otherwise allowable deductions in connection with the use of a home office which is a *principal place* of business."[97] Consequently, a taxpayer may have a principal place of business for each business activity in which he or she is involved.[98]

2. Baie v. Commissioner

Under the holding in *Curphey*, the taxpayer must prove that the home office is the principal place of business for a separate business activity. The Tax Court, utilizing the "focal point" test, focused on where services are performed or where the income at issue is generated. The Tax Court first applied the "focal point" test in *Baie v. Commissioner*.[99] In *Baie*, the taxpayer operated a food stand near her residence.[100] Since the size of the food stand was inadequate for purposes

93. *Id.*

94. *Id.* at 767. The petitioner worked forty hours per week at the hospital and devoted his additional time to reading medical journals and attending seminars. *Id.* The petitioner made approximately twice as much money as a dermatologist than he did in his real estate business. *Id.* at 767-68.

95. *Id.* at 777.

96. *Id.* at 776.

97. *Id.* at 777.

98. *Id.* at 776. The court stated that there was "no indication either in the statute or the legislative history that a taxpayer cannot have more than one principal place of business, for purposes of section 280A(c)(1), if he engages in more than one trade or business." *Id.*

The amended proposed regulation states that "recent amendments to section 280A make clear that a taxpayer may have a principal place of business for each trade or business in which the taxpayer is engaged." Prop. Treas. Reg. § 1.280A, 48 Fed. Reg. 33,320 (1983).

99. 74 T.C. 105 (1980).

100. *Id.* at 106.

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of conducting the business,[101] the taxpayer found it necessary to use her kitchen and a bedroom of her apartment for business purposes.[102]

The IRS disallowed deductions for the home office because the taxpayer had not satisfied the requirements of section 280A(c)(1).[103] In upholding the IRS's decision, the Tax Court stated that, since neither the legislative history nor the statute itself furnished any guidance as to the scope of the "principal place of business" exception, Congress intended the "focal point" of the taxpayer's activities to be the principal place of business.[104] The Tax Court defined the "focal point" as the place where income is produced or where services are provided to customers.[105] The Tax Court held that the petitioner's apartment was not the "focal point" of the taxpayer's business.[106] The principal place of business of the taxpayer's income generating activity was the food stand.[107] Consequently, the taxpayer did not meet the requirements of section 280A and the deduction was disallowed.[108]

3. Jackson v. Commissioner

Since the inception of the "focal point" test, a taxpayer must demonstrate either that goods or services are provided at the home office or that the home office is where the income is generated in order to qualify for a section 280A deduction.[109] In *Jackson v. Commissioner*,[110] the petitioner, a licensed real estate salesperson, was associated with Walker & Lee, a licensed real estate broker.[111] The petitioner was not required to work at Walker & Lee's offices.[112] The petitioner did, however, spend twelve to sixteen hours per week answering customer questions and meeting with potential clients at the offices of Walker & Lee.[113] Although the petitioner had access to an office, she used one room in her apartment as an office.[114] The petitioner de-

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101. The dimensions of the food stand were 10 feet by 10 feet. *Id.*

102. *Id.* The taxpayer used her kitchen in order to prepare food, but still used it for personal purposes. The taxpayer also used one bedroom exclusively for office space. This room contained a desk, adding machine, typewriter, records, and other paperwork maintained in connection with the food stand. *Id.*

103. *Id.* at 108.

104. *Id.* at 109.

105. *Id.* at 109-10.

106. *Id.*

107. *Id.* The court also noted that the taxpayer used her kitchen for personal purposes and could not satisfy the exclusivity requirement of § 280A(c)(1). *Id.* at 110 n.7.

108. *Id.* at 110.

109. *Id.* at 109-10.

110. 76 T.C. 696 (1981).

111. *Id.*

112. *Id.* at 698.

113. *Id.*

114. *Id.* at 697.

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ducted expenses attributable to this office on her individual income tax return.[115]

The IRS disallowed any deduction for the office expenses, stating that the offices of Walker & Lee were the petitioner's principal place of business.[116] The Tax Court sustained the disallowance, holding that the home office was not the petitioner's principal place of business[117] because it did not meet the "focal point" test.[118] The court stated that:

> [W]e must examine the various locations in which petitioner conducted her business and ascertain which location was the "focal point" of her business activities. [S]he has failed to persuade us that her home office was her *principal* place of business. [P]etitioner's first "contact" with clients would be through Walker & Lee's office, and she spent 12 to 16 hours per week in the Walker & Lee offices as a means of acquiring new clients. Petitioner's business card contained Walker & Lee's address and telephone number as well as the telephone number of petitioner's residence . . . . In the circumstances, we find that petitioner has failed to carry her burden of proving that her home office was regularly and exclusively used as her principal place of business.[119]

Consequently, the "focal point" test imposes a substantial burden upon a taxpayer which he or she must overcome in order to qualify for a deduction under section 280A.

4. Pomarantz v. Commissioner

The burden imposed by the "focal point test" is especially heavy in situations where physicians are involved. *Pomarantz v. Commissioner*[120] dealt with a physician who kept a home office for his medical practice.[121] The physician, Dr. Stanley D. Pomarantz, was a licensed physician who specialized in emergency medical care.[122] Dr. Pomarantz conducted his practice as a sole proprietor for the first seven months of

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115. *Id.* at 697-98. The home office was furnished with a desk, sofa, chair, and files of transactions in which she had been involved. *Id.* at 697. The petitioner also met customers in this home office but only on a "sporadic" basis. *Id.* at 698.

116. *Id.* at 699.

117. *Id.* at 699-700.

118. *Id.* at 700.

119. *Id.*

120. 52 T.C.M. (CCH) 599 (1986), *aff'd*, 867 F.2d 495 (9th Cir 1988). For other cases that apply the "focal point" test, see generally, Bradfield v. Commissioner, 48 T.C.M. (CCH) 1071 (1984); Sternberg v. Commissioner, 48 T.C.M. (CCH) 965 (1984); Bilenas v. Commissioner, 47 T.C.M. (CCH) 217 (1983); Harris v. Commissioner, 46 T.C.M. (CCH) 1130 (1983); Lopkoff v. Commissioner, 45 T.C.M. (CCH) 256 (1982); Trussel v. Commissioner, 45 T.C.M. (CCH) 190 (1982); Green v. Commissioner, 78 T.C. 428 (1982), *rev'd*, 707 F.2d 404 (9th Cir. 1983); Strasser v. Commissioner, 42 T.C.M. (CCH) 1125 (1981).

121. *Pomarantz*, 52 T.C.M. (CCH) at 599.

122. *Id.*

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1980.[123] In August of 1980, however, Dr. Pomarantz began conducting his practice through a professional service corporation.[124] Although Dr. Pomarantz provided services at Riverton General Hospital in Seattle, Washington, he was not provided an office at the hospital.[125] Dr. Pomarantz, therefore, used a room over his garage exclusively as his home office where he kept business records, a desk, a chair, a telephone, bookshelves, and filing cabinets.[126] Dr. Pomarantz deducted the expenses attributable to the business portion of his home.[127]

The IRS disallowed any deduction for the expenses attributable to the home office.[128] The Tax Court affirmed the disallowance, holding that the home office was not the petitioner's principal place of business given the fact that the time the petitioner spent at the hospital treating patients greatly outweighed the time he normally spent in the home office.[129] The court further found that the importance of the work done at the hospital was clearly of far greater importance in the conduct of the petitioner's business than the work done in the home office.[130]

Dr. Pomarantz appealed the Tax Court's decision to the Ninth Circuit Court of Appeals.[131] The Ninth Circuit affirmed the Tax Court's application of the "focal point" test and the "where the work is predominantly performed"[132] test to Dr. Pomarantz' situation.[133] The Ninth Circuit stated that "[w]ithout adopting a specific standard, we believe that under any of these tests, the hospital, rather than the home, was Dr. Pomarantz' principal place of business."[134] Therefore, under either the "focal point" test or the "where the work is predominantly performed" test, the hospital was the principal place of business

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123. *Id.*

124. *Id.* The corporation's registered office was the petitioner's residence, and the petitioner was the sole employee of the corporation. *Id.*

125. *Id.* at 600. The petitioner worked thirty-three to thirty-six hours per week at the hospital. *Id.*

126. *Id.* Riverton General Hospital performed billing and accounting services on behalf of the petitioner, and later his corporation, for a fee. *Id.* Also, the petitioner only worked in his home office three to five hours per week. *Id.* at 602.

127. *Id.* at 601.

128. *Id.*

129. *Id.* at 602.

130. *Id.* The court also took into account that the hospital did not provide the petitioner with adequate office space, and that the petitioner needed space to maintain corporate records. The court, however, did not find these facts sufficient to shift the "focal point" of petitioner's activity to his home office. *Id.*

131. Pomarantz v. Commissioner, 867 F.2d 495 (9th Cir. 1988).

132. See *infra* notes 136-89 and accompanying text for a discussion of the "where the work is predominantly performed" test.

133. *Pomarantz*, 867 F.2d at 497-98.

134. *Id.* at 497.

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because Dr. Pomarantz provided services and produced income there.[135]

D. The "Where the Work is Predominantly Performed" Test: A Shift Towards the Facts and Circumstances Test

Prior to *Soliman,* three cases questioned where the "focal point" test is properly applied in determining a taxpayer's principal place of business. These three cases all have one essential theme — the principal place of business is the location where the taxpayer's work is predominantly performed.

1. Drucker v. Commissioner

The first case which questioned the validity of the "focal point" test was *Drucker v. Commissioner.*[136] The petitioner in *Drucker*, Ernest Drucker, was employed as a concert violinist by the Metropolitan Opera Association (Met) which performed at Lincoln Center in New York City.[137] As part of his occupation, Drucker was required to practice in order to perfect his skills. The Met, however, neither provided Drucker with a practice studio, nor otherwise provided any facility for private practice.[138] Drucker, therefore, set aside one room in his five bedroom apartment exclusively for use as a practice studio.[139] The room was furnished with stereo components, record equipment, a piano, records and tapes, musical scores, a desk, and three violins.[140]

The Tax Court found that the studio was not Drucker's principal place of business and disallowed the deduction.[141] The court maintained that Lincoln Center was the "focal point" of Drucker's activities.[142] The court paid particular attention to the fact that Drucker's job did not require him to practice, but did require him to attend re-

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135. *Id.* at 497-98.

136. 79 T.C. 605 (1982), *rev'd*, 715 F.2d 67 (2d Cir. 1983).

137. *Id.* at 606. During the year, the petitioner was employed for the following periods: (1) three continuous pre-season rehearsal weeks; (2) the regular New York season with a duration of no less than twenty-seven weeks; (3) approximately forty-nine tour days; (4) two weeks of performances in the New York City parks; (5) a five week vacation; and (6) five weeks of supplemental unemployment benefits. *Id.*

138. *Id.* at 608. "Practice was necessary . . . in order for petitioner to carry out his [employment] obligations to the Met." *Id.*

139. *Id.* at 608-09. The petitioner practiced in the studio for "approximately 30 hours per week" and it "was used exclusively for such purpose; it was not used for social or personal purposes." *Id.* at 609.

140. *Id.* at 608-09.

141. *Id.* at 615.

142. *Id.* at 613. The court recognized, however, that practice was essential for the petitioner to maintain his technical expertise and to learn the music that was to be played. *Id.*

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hearsals at Lincoln Center.[143] The court, therefore, concluded that "by far the *most important* business location is the place where public performances are held."[144]

a. Judge Wilbur's Dissent

In *Drucker*, Judge Wilbur filed an important dissent. Judge Wilbur's dissent supported the intent of Congress in enacting section 280A of the Internal Revenue Code.[145] In his dissent, Judge Wilbur stressed that the retention of Drucker's job depended upon the quality of his performance at rehearsals and performances.[146] The dissent looked to all of the "facts and circumstances" to determine Drucker's principal place of business.[147] In rejecting the "focal point" test, Judge Wilbur determined that the principal place of business is where Drucker perfected his skills "on a year-round basis."[148]

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143. *Id.* The court found this important because "[a] day missed of practice would not be known to the employer" but a day of "missed rehearsal or performance normally would result in his pay being docked." *Id.*

144. *Id.* The court maintained that "[i]t is only at the performances that the Met and its musicians are judged by the public." *Id.* Therefore, the Met was determined to be the principal place of business because it was the place where the public came to listen to the orchestra. *Id.*

145. *Id.* at 617 (Wilbur, J., dissenting). Congress wanted to provide definitive rules to establish the deductibility of expenses attributable to a home office. Most importantly, Congress wanted to make sure that living expenses were not converted into deductible business expenses. *See* S. REP. NO. 938, 94th Cong., 2d Sess. 1, 147 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579-80.

146. *Drucker*, 79 T.C. at 621 (Wilbur, J., dissenting). Judge Wilbur noted that his ability to play to the high standards of the Met demanded that the greater portion of his time be spent in his studio practicing. *Id.* (Wilbur, J., dissenting).

147. *Id.* (Wilbur, J., dissenting). The dissent stated that the court "must look at 'all the facts and circumstances' to determine which place of business, in light of activities performed there, is most important to petitioner's trade or business." *Id.* (Wilbur, J., dissenting).

148. *Id.* at 623 (Wilbur, J., dissenting). In footnote eight of his dissent, Judge Wilbur compared the petitioner's situation to that of a trial lawyer:

> Is the courtroom the most important business location of a trial lawyer, even when he works on a contingent basis? This is where the spotlight focuses on his performance as a trial lawyer (the public focal point) and where the playoff is, but isn't preparation infinitely more important? . . . .Surely, his [the petitioner's] principal place of business is his studio and not the various concert halls he plays in, although the spotlight focuses on his performance in the concert hall where he is watched by and judged by the public.

Id. at n.8 (Wilbur, J., dissenting). Judge Korner also dissented in *Drucker*. Judge Korner stated:

> In the instant case, I would find that petitioner's trade or business was that of a concert violinist and musician. . . . [T]he requirement that he stay in practice was obvious, and his home studio was the only place he had in which to carry on that individual practice while he was in New York, which was the majority of the time in the years before us.

Id. at 625 (Korner, J., dissenting). Judge Korner concluded by stating that "[h]is home practice studio can thus be fairly considered as the 'focal point,' or the home base, of petitioner's activities as a performing musician, albeit other activities, i.e., group rehearsals and performances, were carried out in a number of other places." *Id.* at 626.

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b. The Second Circuit Court of Appeals

Drucker appealed the Tax Court's decision to the Second Circuit Court of Appeals.[149] The Second Circuit held that the Tax Court's holding was clearly erroneous and reversed the Tax Court's decision[150] on the grounds that "[t]he place of performance was immaterial so long as the musicians were prepared, and most of the preparation occurred at home."[151] The court focused on the fact that the Met did not provide space for Drucker to practice.[152] Therefore, using one room exclusively as practice space "was an expense almost entirely additional to nondeductible personal living expenses."[153] *Drucker* was the first case to question the validity of the "focal point" test with respect to Congress' intent in enacting section 280A.

2. Weissman v. Commissioner

The second case to question the validity of the "focal point" test was *Weissman v. Commissioner*.[154] The petitioner in *Weissman*, David J. Weissman, was employed as an associate professor at City College of the City University of New York (CCNY).[155] Weissman taught classes three days a week from eight to eleven o'clock in the morning.[156] In addition to his normal classroom activities, Weissman was also required, in order to retain his position, to do research and writing in his field of study.[157] CCNY allowed Weissman to use an office for his normal classroom activities.[158] Weissman was required, however, to share

149. Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983).

150. *Id.* at 70. The court could "not understand how the Tax Court . . . can say . . . that '[a]s a professional musician [Drucker] was required to practice numerous hours . . . to . . . perfect his skill' . . . while denying . . . that practice was a 'condition of employment.' " *Id.* at 69.

151. *Id.* The court further stated that "this [is] the rare situation in which an employee's principal place of business is not that of his employer." *Id.*

152. *Id.* at 68.

153. *Id.* at 70. The court also dealt with the convenience of the employer element of § 280A(c)(1). The court merely stated that the "home practice by appellants was for the convenience of [their] employer." *Id.* It should be noted that the appellate court dealt with three musicians, all from the Met, that were denied home office deductions by the Tax Court. All three cases were based on the same facts.

154. 47 T.C.M. (CCH) at 520.

155. *Id.* at 521.

156. *Id.* During this time, the petitioner was required to meet with students, prepare lectures, and grade examinations. *Id.*

157. *Id.* This research and writing was evaluated by the chairman of the department at the end of each year. *Id.* This writing had to show continued growth and, in order to get a promotion, "a candidate must demonstrate 'an established reputation for excellence in teaching and scholarship in his discipline.' " *Id.*

158. *Id.*

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this office with other members of the faculty.[159] Because of the inadequate space, Weissman used two bedrooms in his ten bedroom apartment exclusively for his research and writing projects.[160] The IRS disallowed the deductions taken by Weissman for the expenses attributable to his home office.[161] The IRS stated that Weissman had failed to establish that his home office was his principal place of business.[162] The Tax Court sustained the disallowance of the deductions.[163] The court stated that "[i]n determining a taxpayer's principal place of business, we must ascertain the 'focal point' of his business activities."[164] The court reasoned that, even though research and writing was an important part of the petitioner's job, it did not change the "focal point" of Weissman's activities from CCNY to his home office.[165] The Tax Court considered *Drucker*, but concluded that the facts of *Weissman* presented a different question.[166] The court stated that "[w]e think that *Drucker* presents a different situation from that of a college professor, such as petitioner."[167]

Weissman appealed the decision of the Tax Court to the Second Circuit Court of Appeals.[168] The Second Circuit held that Weissman's home office was his principal place of business and allowed the deduction.[169] The court stated that the "focal point" test "creates a risk of shifting attention to the place where a taxpayer's work is more visible, instead of the place where the dominant portion of his work is accomplished."[170] The court based its determination of the principal place of

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159. *Id.* The office was approximately 160 square feet and contained several desks and chairs, but no typewriters. *Id.* Also, it was not a safe place to leave teaching, writing, or other materials. *Id.* The petitioner spent fourteen to fifteen hours per week in this office. *Id.*

160. *Id.* The maintenance of this home office was not a requirement of his employment at CCNY. *Id.* The petitioner furnished this office with a desk, a typewriter, chairs, filing cabinets, and books. *Id.*

161. *Id.* at 522.

162. *Id.* The respondent also argued that the petitioner had failed to establish that the home office was kept for the convenience of his employer. *Id.*

163. *Id.* at 523.

164. *Id.* at 522.

165. *Id.*

166. *Id.* at 522-23.

167. *Id.*

168. Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984). The court took special note of the fact that the petitioner spent eighty percent of his work week in his home office and the fact that the college did not provide adequate space for the petitioner to effectively carry out his employment duties. *Id.* at 516.

169. *Id.* at 514-16.

170. *Id.* at 514. The court found that "the Tax Court focused too much on Professor Weissman's title and too little on his activities." *Id.* The court further noted that "[t]o the extent the Tax Court found City College to be the focal point of Professor Weissman's activities simply because he taught courses there, it erred as a matter of law by failing to consider all aspects of his activities." *Id.*

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business on three criteria: "[1] the nature of his business activities; [2] the attributes of the space in which such activities can be conducted; and [3] the practical necessity of using a home office to carry out such activities."[171] Applying this test to the facts of the case, the *Weissman* court stated that "these factors weigh in favor of permitting the home office deduction."[172]

3. Meiers v. Commissioner

Prior to *Soliman*, the last case to question the validity of the "focal point" test was *Meiers v. Commissioner*.[173] In *Meiers*, the petitioner, John Meiers, and his wife were the owners of a laundromat and a dry cleaning business.[174] The laundromat consisted of one large room that contained "several coin-operated washing machines, dryers, and dry cleaners."[175] The petitioner's wife worked at the laundromat approximately one hour each day.[176] Mrs. Meiers' primary responsibility, however, was to do the bookkeeping and other managerial tasks associated with the laundromat.[177] For this purpose, she kept an office in a separate room in their home which was comprised "of a desk, filing cabinet, safe, change counter, and [a] sofa."[178] The office was used approximately two hours per day to do the bookkeeping and other managerial tasks associated with the laundromat.[179] The room was used exclusively for purposes of performing these administrative duties.[180]

The IRS disallowed the deduction asserting that the Meiers' home office was not the principal place of business of the laundromat.[181] The Tax Court agreed with the IRS and held that the home office was not

171. *Id.* at 514-15.

172. *Id.* at 515 n.5. The court also dealt with the requirement that the home office be kept for the convenience of the employer. The court stated that, since the college did not provide the petitioner with adequate space, "the maintenance of residential space exclusively for such purpose was an expense almost entirely additional to nondeductible personal living expenses." *Id.* at 516 (quoting Drucker v. Commissioner, 715 F.2d 67, 70 (2d Cir. 1982)).

173. 49 T.C.M. (CCH) 136 (1984), *rev'd*, 782 F.2d 75 (7th Cir. 1986).

174. *Id.* at 136. The petitioners hired three attendants and two cleaning employees at the laundromat. *Id.* at 137.

175. *Id.* This laundromat was located approximately one mile from the petitioners' home. *Id.*

176. *Id.* During the hour that Mrs. Meiers worked at the laundromat, she would meet with employees, collect the money from the machines, and provide assistance to customers. *Id.*

177. *Id.*

178. *Id.* Mrs. Meiers used the home office for "about five minutes each month to account for two rental payments received by [the partnership] and one mortgage payment issued by the [partnership]." *Id.*

179. *Id.*

180. *Id.*

181. *Id.* The respondent conceded the petitioners' exclusive and regular use of the home office for business purposes. *Id.*

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the Meiers' principal place of business.[182] Utilizing the "focal point" test, the court stated that "extensive case law has construed the phrase 'principal place of business' as it is employed in section 280A(c)(1)(A) to be the specific situs in which the business is carried on or the 'focal point' of the business' activities."[183] The court compared the facts of the case with *Baie* and *Drucker* and concluded that the "*Baie* case controls the instant case and compels the conclusion that the principal place of business of petitioners' laundromat business was at the laundromat."[184]

The Meiers appealed the Tax Court's decision to the Seventh Circuit Court of Appeals.[185] The Seventh Circuit questioned the validity of the "focal point" test and held that the Tax Court erred in disallowing deductions for the expenses attributable to the home office.[186] The court analyzed the reasoning of *Drucker* and *Weissman* and stated that "[t]he focal point test . . . places [an] undue emphasis upon the location where goods or services are provided to customers and [where] income [is] generated, not necessarily where [the] work is predominantly performed."[187] The court's primary consideration was the length of time that the taxpayer spent in the home office as opposed to other locations.[188] The court concluded that "Mrs. Meiers spent most of her time in the home office and performed what may be her most important functions as a manager [at the home office]. The Meiers made a legitimate business decision not to create office space at the laundromat."[189]

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182. *Id.*

183. *Id.* at 138. The court also stated that there could only be one principal place of business for each business in which a taxpayer is involved. *Id.*

184. *Id.* See *supra* notes 99-108 and accompanying text for a discussion of *Baie*. See also *supra* notes 136-153 and accompanying text for a discussion of *Drucker*.

185. Meiers v. Commissioner, 782 F.2d 75 (7th Cir. 1986).

186. *Id.* at 79. The court stated "[w]e, like the Second Circuit, question the usefulness of the focal point test." *Id.*

187. *Id.* The court subsequently stated that "[t]he focal point test is concededly easy to apply and is less subjective than pre-section 280A standards. Yet we do not believe this approach is fair to taxpayers or carries out in the most appropriate way the apparent intent of Congress." *Id.*

188. *Id.* The *Meiers* court stated that:

> In determining the taxpayer's principal place of business, we think a major consideration ought to be the length of time the taxpayer spends in the home office as opposed to other locations. . . . But time spent is not necessarily the only consideration. There are other factors, which may from time to time weigh in the balance, such as the importance of the business functions performed by the taxpayer in the home office; the business necessity of maintaining a home office; and the expenditures of the taxpayer to establish a home office.

Id. (citations omitted).

189. *Id.* The Commissioner conceded that this was not a situation in which the taxpayers were trying to convert nondeductible living expenses into deductible business expenses. *Id.*

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III. FACTS AND HOLDING

A. *Statement of Facts*

Nader E. Soliman, an anesthesiologist, was a sole proprietor prior to September 1, 1983, at which time he incorporated to form Nader Soliman, M.D.[190] During 1983, three area hospitals employed Soliman.[191] Soliman spent thirty to thirty-five hours per week at these hospitals.[192] Soliman spent the majority of his time at Suburban Hospital.[193] None of these hospitals provided Soliman with an office.[194] Instead, Soliman used one bedroom of his three bedroom apartment as his office.[195]

From his office, Soliman contacted surgeons, patients, and the three hospitals at which he was employed.[196] Although Soliman spent two to three hours per day working in his home office,[197] he did not treat patients there.[198] Soliman's only personal use of the home office was to balance his checking account.[199] Soliman's checking account combined both business and personal affairs.[200]

On his individual income tax return, Soliman deducted the expenses attributable to his home office.[201] Furthermore, Soliman drove a Buick exclusively on trips between his home office and the hospitals, and between the hospitals and the hotels where he stayed while on call.[202] Soliman claimed an additional deduction for the depreciation expense attributable to the Buick.[203] The IRS disallowed the home of-

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190. Soliman v. Commissioner, 94 T.C. 20, 21 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S.Ct. 701 (interim ed. 1993). This fact is important in establishing whether the home office was established for the convenience of his employer.

191. *Id.* The petitioner worked at Suburban Hospital in Bethesda, Maryland, Shady Grove Hospital in Rockville, Maryland, and Loudon Memorial Hospital in Leesburg, Virginia. *Id.*

192. *Id.*

193. *Id.* The Petitioner spent 80% of his time at Suburban Hospital and most of his remaining time at Loudon Hospital. *Id.*

194. *Id.*

195. *Id.* Soliman furnished the home office with a chair, a desk, a couch, records, billing records, patients logs, names of surgeons and insurance companies, as well as medical texts. *Id.* Soliman also prepared for his monthly presentation to post-anesthesia care nurses at Suburban Hospital in his home office. *Id.* at 22.

196. *Id.* at 21.

197. *Id.* at 22.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* A taxpayer is allowed a deduction for depreciation expenses for an automobile used for business purposes. *See* I.R.C. § 167(a)(1)(1989); *see also* I.R.C. § 280F (a)(2)(A) (1989) (limitation on depreciation of automobiles). This only applies if the use of the automobile is used for transportation from the principal place of business to other business locations. If the home

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fice deduction as well as the deductions Soliman had taken in connection with his use of the Buick.[204]

B. *The Tax Court Opinion*

The Tax Court held that the deductions were allowable under section 280A(c)(1)(A) because Soliman's home office was his principal place of business.[205] The court found that the "facts and circumstances" test should be utilized instead of the "focal point" test[206] in determining the principal place of business for purposes of section 280A.[207] The Tax Court set out three basic criteria for determining whether the home office is the principal place of business under the "facts and circumstances" test: (1) the taxpayer's home must be essential to his business; (2) the taxpayer must spend a substantial amount of time there; and (3) there must be no other location available to perform the office functions of the business.[208]

The court also provided other factors which should be considered. These factors included the business exigencies which favored a home office, whether the home office is suitable for the essential business functions performed there, and the appropriateness of the furnishings.[209] Furthermore, the court stated that "[p]etitioner's business required him to perform two very different functions: (1) To render medical services at hospitals, and (2) to care for administrative chores . . . ."[210] The court held that both functions were essential to a successful medical practice.[211] Two judges did, however, dissent.

Judge Ruwe, in his dissent, concluded that he "would apply the test adopted by the Second and Seventh Circuit Courts of Appeals . . . ."[212] This test requires a court to determine the place where the dominant portion of the taxpayer's work is accomplished.[213] Further, in applying this test, the court must evaluate the amount of time spent in

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office is not considered the principal place of business, these expenses would be nondeductible commuting expenses.

204. *Soliman*, 94 T.C. at 22.

205. *Id.* at 29. The Tax Court went on to indicate that it would no longer follow its opinion in Drucker v. Commissioner, 79 T.C. 605 (1982), *rev'd*, 715 F.2d 67 (1983) in certain cases.

206. *Soliman*, 94 T.C. at 25. Under the "focal point" test, the principal place of business is the place where goods and services are provided to customers and where revenues are generated. *Id.*; *see* Baie v. Commissioner, 74 T.C. 105, 109 (1980).

207. *Soliman*, 94 T.C. at 25-26.

208. *Id.* at 29.

209. *Id.*

210. *Id.* at 26.

211. *Id.*

212. *Id.* at 41. (Ruwe, J., dissenting); *see supra* notes 136-89 and accompanying text (discussing the "where the work is predominantly performed" test).

213. *Soliman*, 94 T.C. at 41. (Ruwe, J. dissenting).

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the home office and the importance of the business functions performed there.[214] Thus, Judge Ruwe would not have allowed Soliman a home office deduction.[215]

Likewise, Judge Nims also dissented.[216] Judge Nims would have "preserve[d] the focal point test, modified to the extent necessary in the rare situation where in time and importance the home office itself became the focal point of the taxpayer's activities."[217] Judge Nims believed that "the reintroduction of a facts and circumstances inquiry takes us all the way back to square one, i.e., to the situation which existed even before Congress took what it thought would be the remedial action of section 280A."[218] Judge Nims concluded that Soliman did not meet the modified test or the "unglossed focal point" test.[219]

C. *The Fourth Circuit Court of Appeals*

The IRS appealed the Tax Court's decision to the Fourth Circuit Court of Appeals.[220] The Fourth Circuit found that Proposed Income Tax Regulation 1.280A[221] "represented the spirit of section 280A" and justified affirming the "facts and circumstances" test.[222] Furthermore, the court noted that the "new 'facts and circumstances' test does not eviscerate the requirements of section 280A, but simply replaces the inflexible and potentially unjust 'focal point' test."[223] The majority held that the "facts and circumstances" test more accurately reflects the purpose of section 280A.[224]

Judge Phillips dissented, concluding that, when a taxpayer is engaged in business at more than one location, there should be a compari-

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214. *Id.* (Ruwe, J., dissenting).

215. *Id.* (Ruwe, J., dissenting).

216. *Id.* at 32. (Nims, C.J., dissenting).

217. *Id.* (Nims, C.J., dissenting).

218. *Id.* at 33. (Nims, C.J., dissenting).

219. *Id.* (Nims, C.J., dissenting).

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

221. Prop. Treas. Reg. § 1.280A, 48 Fed. Reg. 33,320, 33,324 (1983).

222. *Soliman*, 935 F.2d at 54. The *Soliman* court reached this conclusion because the proposed regulation gives an example of the deduction as it applies to an outside salesman. The court stated:

> The Tax Court's 'facts and circumstances' test reflects the same policy that undergirds the IRS's proposed regulation allowing salespersons to deduct home office expenses. The regulation provides that salespersons can deduct expenses from a home office even though they spend most of their time on the road as long as they spend 'a substantial amount of time on paperwork at home.'

Id. (quoting Prop. Treas. Reg. § 1.280A-2(b)(3), 48 Fed. Reg. at 33,324).

223. *Soliman*, 935 F.2d at 55.

224. *Id.*

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son of the time spent at each location.[225] Judge Phillips agreed with Judge Ruwe and Judge Nims of the Tax Court:[226]

> As the dissenting Tax Court judges in this case both recognized, those decisions actually provide more proper tests for locating the principal place of business than does the amorphous "facts and circumstances" test. Chief Judge Nims proposed a "time and importance" modification of the "focal point" test. Judge Ruwe suggested a test under which a taxpayer's principal place of business would be "the place where the dominant portion of the taxpayer's work is accomplished." [E]ither of these tests is more consistent with the meaning of [section] 280A than is the Tax Court's new, more open-ended one.[227]

Judge Phillips would not have allowed the deduction because Soliman neither spent the majority of his time at his home office, nor performed his most important function, treating patients, at his home office.[228]

D. The United States Supreme Court Opinion

The IRS appealed the Fourth Circuit's decision to the United States Supreme Court.[229] The Supreme Court, in an eight to one decision, reversed the Fourth Circuit's holding.[230] The Court reversed the Fourth Circuit because the "facts and circumstances" test "[f]ails to undertake a comparative analysis of the various locations of the taxpayer in deciding whether the home office was the principal place of business . . . ."[231] The Court set forth two basic criteria for determining whether the home office is the principal place of business: "[1] the relative importance of the activities performed at each business location and [2] the time spent at each location."[232]

The Court also provided guidelines for federal courts to apply in analyzing the relative importance of the functions performed at each location. The Court stated that:

> Analysis of the relative importance of the functions performed at each business location depends upon an objective description of the business in question. This preliminary step is undertaken so that the decisionmaker can evaluate the activities conducted at the various business locations in

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225. *Id.* (Phillips, J., dissenting).

226. *Id.* (Phillips, J., dissenting).

227. *Id.* at 56 (Phillips, J., dissenting).

228. *Id.* (Phillips, J., dissenting).

229. Commissioner v. Soliman, 113 S. Ct. 701 (interim ed. 1993).

230. *Id.* at 708. Justices Blackmun and Thomas filed separate concurring opinions. *Id.* at 708-09. Justice Stevens filed the only dissenting opinion. *Id.* at 711.

231. *Id.* at 703-04.

232. *Id.* at 706. The Court admitted that this is not an "objective formula that yields a clear answer in every case." *Id.* The ultimate determination is based on the particular facts of each case. *Id.*

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> light of the particular characteristics of the specific business or trade at issue.[233]

The Court decided that the "focal point" test's criteria should be given great weight in "determining the place where the most important functions are performed."[234] The Court also disagreed with the Fourth Circuit in weighing the functions performed at home.[235] The Court stated that "all steps are essential" and that "[e]ssentiality . . . is but a part of the assessment of the relative importance of the functions performed at each of the competing locations."[236]

The Court also disagreed with the Fourth Circuit's "reliance on the availability of alternative office space as an additional consideration in determining a taxpayer's principal place of business."[237] The Court found that this consideration should be used to determine if an employee is using the home office for the "convenience of his employer."[238] The Court went so far as to state that the availability of alternative office space should have no bearing on whether a home office qualifies as the taxpayer's principal place of business.[239] The Court concluded that this criterion should not be used because "any taxpayer's home office that meets the criteria here set forth is the principal place of business regardless of whether a different office exists . . . ."[240]

The second factor set forth by the Court was a comparison of the relative amounts of time spent at each location.[241] The Court noted that this factor becomes very significant when a "comparison of the importance of the functions performed at various places yields no definitive answer to the principal place of business inquiry."[242] If the inquiries do not yield a principal place of business, the home office will not become the principal place of business by default.[243] Therefore, it is

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233. *Id.* The Court further stated that "[i]f the nature of the trade or profession requires the taxpayer to meet or confer with a client or patient or to deliver goods or services to a customer, the place where that contact occurs is often an important indicator of the principal place of business." *Id.*

234. *Id.* The Court specifically stated that "the point where goods and services are delivered must be given great weight in determining the place where the most important functions are performed." *Id.*

235. *Id.* at 707.

236. *Id.* The Court further stated that "[w]hether the functions performed in the home office are necessary to the business is relevant to the determination of whether a home office is the principal place of business in a particular case, but it is not controlling." *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 707-08.

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possible to work through the Court's analysis and still not determine the taxpayer's principal place of business.

Using these two criteria, the Court determined that Soliman's home office was not his principal place of business.[244] The Court took special notice of the fact that "actual treatment [is] the most significant event in the professional transaction."[245] The income generating activities which took place in the home office, therefore, "must be regarded as less important to the business of the taxpayer than the tasks performed at the hospital[s]."[246] The Court also stated that a comparison of the time spent in the home office with the time spent at the hospitals yields the same result.[247] The Court specifically stated that the "[t]he 10 to 15 hours per week spent in the home office . . . [were] insufficient to render the home office the principal place of business . . . ."[248]

1. Justice Thomas' Concurrence

Justice Thomas, writing separately, concurred only in the result reached by the Court.[249] Justice Thomas reasoned that the "focal point" test should be used because it provides a clear method of determining a taxpayer's principal place of business.[250] Justice Thomas stated that:

> [T]he "focal point" test . . . provides a clear, reliable method for determining whether a taxpayer's home office is his "principal place of business." I would employ the totality-of-the-circumstances inquiry, guided by the two factors discussed by the Court, only in the small minority of cases where the home office is one of several locations where

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244. *Id.* at 708.

245. *Id.* The Court further stated:

> The practice of anesthesiology requires the needed doctor to treat patients under conditions demanding immediate, personal observation. So exacting were these requirements that all of [Soliman's] patients were treated at hospitals, facilities with special characteristics designed to accommodate the demands of the profession. The actual treatment was the essence of the profession service.

Id.

246. *Id.*

247. *Id.*

248. *Id.* Justice Blackmun, in his concurring opinion, stated that § 280A(c)(1)(A) "invites and compels a comparison" of the time spent at the respective business locations. *Id.* (Blackmun, J., concurring). Justice Blackmun concluded:

> The bulk of [Soliman's] professional time and performance is spent in the hospitals. By any measure, the greater part of his remuneration is generated and earned there. His home office well may be important, even essential, to his professional activity, but it is not "principal." The fact that it is his primary, perhaps his only, office is not in itself enough.

Id. at 708-09.

249. *Id.* at 711 (Thomas and Scalia, JJ., concurring).

250. *Id.* at 709 (Thomas and Scalia, JJ., concurring).

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> goods or services are delivered, and thus also one of the multiple locations where income is generated.[251]

Justice Thomas admitted that there will be cases where the "focal point" test will not identify the taxpayer's principal place of business.[252] It is in these situations, according to Justice Thomas, that the two factors set forth by the majority should be utilized.[253]

Justice Thomas demonstrated the weakness of the "function and time" test by using the facts of *Soliman*.[254] Under the "focal point" test, the Court's analysis is complete because Soliman's home office "would not qualify for the [section] 280A(c)(1)(A) deduction."[255] Using the majority's two part test, however, further analysis is necessary.[256] The Court would have to consider further evidence relating to the issues of what types of functions were performed at the home office and the amount of time the taxpayer spent at his home office.[257] Justice Thomas stated that, if the facts were altered, he would be at a loss as to which factors should take precedence. Justice Thomas stated that:

> [I]f the facts [of Soliman] were altered slightly . . . [w]hich factor would take precedence? The importance of the activities undertaken at the home office compared to those at the hospitals? The number of hours spent at each location? I am at a loss, and I am afraid that the taxpayer, his attorney, and a lower court would be as well.[258]

Therefore, according to Justice Thomas, the Court erred "in not unequivocally adopting [the focal point test]."[259]

2. Justice Stevens' Dissent

Justice Stevens' dissent supports the intent of Congress in enacting section 280A of the Internal Revenue Code.[260] Justice Stevens stressed that self-employed taxpayers must satisfy three strict conditions in order to qualify for the home office deduction.[261] First, the home office

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251. *Id.* (Thomas and Scalia, JJ., concurring).
252. *Id.* at 710 (Thomas and Scalia, JJ., concurring).
253. *Id.* (Thomas and Scalia, JJ., concurring).
254. *Id.* (Thomas and Scalia, JJ., concurring).
255. *Id.* (Thomas and Scalia, JJ., concurring).
256. *Id.* (Thomas and Scalia, JJ., concurring).
257. *Id.* (Thomas and Scalia, JJ., concurring).
258. *Id.* at 711 (Thomas and Scalia, JJ., concurring).
259. *Id.* at 710 (Thomas and Scalia, JJ., concurring).
260. Congress wanted to provide definitive rule to establish the deductibility of expenses attributable to a home office. *See* S. REP. No. 938, 94th Cong., 2d Sess. 1, 147 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3579, 3580. Most importantly, Congress wanted to make sure that living expenses were not converted into deductible business expenses. *Id.*
261. *Soliman*, 113 S. Ct. at 713 (Stevens, J., dissenting).

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must be used exclusively for business purposes.[262] Second, the home office must be used on a regular basis for business purposes.[263] Third, the home office must satisfy one of the three exceptions set out in section 280A(c)(1).[264] Only subsection (A) of section 280A was available to Soliman because he neither treated patients at his home office (subsection (B)),[265] nor maintained a separate structure devoted exclusively to his medical practice (subsection (C)).[266] The main thrust of Justice Stevens' dissent was that the majority had effectively commingled subsection (A) and subsection (B) of section 280A.[267]

Justice Stevens also stressed that the majority had failed to place subsection (B) on an equal footing with subsections (A) and (C). Justice Stevens, in this regard, stated that:

> By injecting a requirement of subsection (B) into subsection (A) the Court renders the latter alternative entirely superfluous. Moreover, it sets the three subsections on unequal footing: subsection (A) will rarely apply unless it includes subsection (B); subsection (B) is preeminent; and the logic of the Court's analysis would allow a future court to discover that, under subsection (C), a separate structure is not truly "separate" (as a principal place of business is not truly "principle") unless it is also the site of meetings with patients or clients.[268]

This type of analysis "encourages the misapplication of a relatively simple provision of the Revenue Code."[269] Justice Stevens also noted that the unavailability of alternative office space is an element of the Commissioner's proposed regulation.[270]

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262. *See* I.R.C. § 280A(c)(1) (1988). Justice Stevens stated that "[t]his requirement is itself sufficient to eliminate many of the abuses associated with the pre-1976 'appropriate and helpful' standard; the taxpayer must now entirely devote a separately identifiable space . . . to his business." *Soliman*, 113 S. Ct. at 713 (Stevens, J., dissenting) (footnote omitted); *see also supra* notes 70-76 and accompanying text.

263. *See* I.R.C. § 280A(c)(1) (1988); *see also supra* notes 77-82 and accompanying text.

264. *See* I.R.C. § 280A(c)(1)(A)-(C) (1988); *see also supra* notes 62-63 and accompanying text. Justice Stevens noted that Soliman met the first and second conditions. *Soliman*, 113 S. Ct. at 715 (Stevens, J., dissenting).

265. *See* I.R.C. § 280A(c)(1)(B) (1988).

266. *See* I.R.C. § 280A(c)(1)(C) (1988).

267. Commissioner v. Soliman, 113 S. Ct. 701, 714 (interim ed. 1993)(Stevens, J., dissenting). Justice Stevens stated that the majority is "injecting a requirement of Subsection (B) in subsection (A) . . . ." *Id.*

268. *Id.* (Stevens, J., dissenting).

269. *Id.* (Stevens, J., dissenting). Justice Stevens stated that "[t]he Court today steps blithely into territory in which several courts of appeal and the Tax Court, whose experience in these matters is much greater than ours, have learned not to tread; in so doing it reads into the statute a limitation Congress never meant to impose." *Id.* (Stevens, J., dissenting).

270. *Id.* at 714 n.13 (Stevens, J., dissenting); *see also* Prop. Treas. Reg. § 1.280A-2, 48 Fed. Reg. 33,320, 33,324 (1983).

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Justice Stevens would have affirmed the lower courts' holdings because the "facts and circumstances" test is "both true to the statute and practically incapable of abuse."[271] Justice Stevens noted the fact that Soliman was not employed by the hospitals as well as the fact that none of the hospitals provided Soliman with an office and concluded that Soliman "must pay all the costs necessary for him to have any office at all."[272] According to Justice Stevens, a deduction should be permitted:

> [w]hen it is clear that no risk of the kind of abuse that led to the enactment of [section] 280A is present, and when the taxpayer has satisfied a reasonable, even a strict, construction of each of the conditions set forth in [section] 280A, a deduction should be allowed for the ordinary cost of maintaining his home office.[273]

Further, Justice Stevens also noted that "[a] self-employed person's efficient use of his or her resources should be encouraged by sound tax policy."[274]

IV. ANALYSIS

In *Soliman v. Commissioner*,[275] the Supreme Court of the United States set forth specific factors on which it based its decision. In addition to satisfying the requirements of section 280A(c)(1),[276] the taxpayer must also satisfy two requirements under the "function and time" test in order to establish his home office as his principal place of business and thereby obtain a section 280A deduction: "[1] the relative importance of the activities performed at each location and [2] the time spent at each location."[277] Satisfying these two criteria will not, however, automatically establish that the home office is the taxpayer's principal place of business. The taxpayer must also satisfy the other requirements of section 280A(c)(1).

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271. *Soliman*, 113 S. Ct. at 712 (Stevens, J., dissenting).

272. *Id.* at 715 (Stevens, J., dissenting). The dissent noted that "[w]hen the 'principal place of business' is used in other statutes that establish . . . jurisdiction or venue . . . it commonly the headquarters of a business." *Id.* at 714-15 (Stevens, J., dissenting); *see* Texas v. New Jersey, 379 U.S. 674, 680 (1965) (the court used the term main office and principal place of business interchangeably).

273. *Soliman*, 113 S. Ct. at 715 (Stevens, J., dissenting).

274. *Id.* (Stevens, J., dissenting).

275. 113 S. Ct. 701.

276. *See supra* note 62 and accompanying text.

277. *Soliman*, 113 S. Ct. at 706. Both the Tax Court and the Fourth Circuit set forth three criteria: "(1) the office in the home is essential to the taxpayer's business; (2) [the taxpayer] spends a substantial amount of time there; and (3) there is no other location available for performance of the taxpayer's administrative or management activities." Soliman v. Commissioner, 935 F.2d 52, 54 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

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The *Soliman* Court's "function and time" test restricts the scope of section 280A. Congress provided three exceptions[278] to the general rule disallowing a deduction for expenses attributable to a home office. The "facts and circumstances" test allows these three exceptions to function independently of one another. Both the "focal point" test and the "function and time" test, for all practical purposes, eliminate the principal place of business exception. The "facts and circumstances" test is also consistent with the legislative history of section 280A.

In *Soliman*, the Commissioner argued that the "facts and circumstances" test "create[s] a loophole that every taxpayer will abuse."[279] The "facts and circumstances" test, however, has requirements that are difficult to satisfy. Furthermore, section 280A has additional requirements that safeguard against possible taxpayer abuse. Finally, the "facts and circumstances" test also provides better public policy than either the "focal point" test or the "function and time" test. Consequently, the analysis utilized by both the Tax Court and the Fourth Circuit in *Soliman* is correct and dictates the abrogation of both the "focal point" test and the Supreme Court's "function and time" test.

A. The "Focal Point" Test and the "Function and Time" Test Restrictions on the Scope of Section 280A

Section 280A contains three exceptions to the general rule disallowing a deduction for expenses which are attributable to the business portion of a personal residence.[280] Both the "focal point" test and the "function and time" test, for all practical purposes, combine section 280A(c)(1)(A) and section 280A(c)(1)(B).[281] Focusing on the location in which services are provided or in which the income generating activity at issue takes place "merges the 'principal place of business' exception with the 'meeting clients' exception and practically eliminates the principal place of business exception from section 280A."[282] Thus, "any home that qualifies under the focal point test . . . (with its emphasis on the point of business exchange) generally will already have qualified

278. I.R.C. § 280A(c)(1)(A)-(C) (1988); *see supra* note 62 and accompanying text.

279. *Soliman*, 935 F.2d at 54.

280. I.R.C. § 280A(c)(1)(A)-(C) (1988); *see supra* note 62 and accompanying text.

281. Section 280A(c)(1)(A) is the principal place of business exception and § 280A(c)(1)(B) is the meeting or dealing with customers, clients, and patients in the normal course of business at the home office exception. *See* I.R.C. § 280A(c)(1)(A)-(B).

282. Soliman v. Commissioner, 94 T.C. 20, 25 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

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due to client or customer contact."[283] Therefore, "[i]t is clear that the 'focal point test' . . . sharply restricts the scope of the statute."[284]

The Supreme Court's "function and time" test also restricts the scope of section 280A. The "function and time" test, like the "focal point" test, "merges the 'principal place of business' exception with the 'meeting clients' exception."[285] The Supreme Court stated that "the place where goods are delivered or services rendered must be given *great weight* in determining the place where the most important functions are performed."[286] Unless the taxpayer meets or deals with patients, clients, or customers at the home office, the home office will be given less weight than the place where the goods are delivered or the services are rendered. This forces a taxpayer who does not deal with patients, clients, or customers at his home office to overcome a presumption that his home office is not his principal place of business. The only way to overcome this presumption is for the taxpayer to show that he or she spent a much greater amount of time in the home office than in the place where the goods are delivered or the services are rendered.

Justice Stevens' dissent stressed that the impact of the majority opinion is to combine subsection (A) with subsection (B).[287] Justice Stevens stated that "subsection (A) will rarely apply unless it includes subsection (B); subsection (B) is preeminent . . . ."[288] Congress provided three exceptions to the general rule that expenses attributable to a home office are not deductible.[289] Since Congress provided three exceptions, "it is clear that subsection (A) was included to describe places where the taxpayer does not normally meet with patients, clients, or customers."[290] A home office could satisfy all three exceptions to section 280A. To suggest, as the majority opinion does, that the home office "need always satisfy subsection (B), or even whether it satisfies (B) has anything to do with whether it satisfies (A), encourages the misapplication of a relatively simple provision of the Revenue Code."[291] Therefore, it is clear that the "function and time" test restricts the

283. Drucker v. Commissioner, 79 T.C. 605, 623 (1982), *rev'd*, 715 F.2d 67 (2d Cir. 1983) (Wilbur, J., dissenting).

284. *Id.* (Wilbur, J., dissenting).

285. *Soliman*, 94 T.C. at 25.

286. Commissioner v. Soliman, 113 S. Ct. 701, 706 (interim ed. 1993) (emphasis added). This is very similar to the "focal point" test. The *Baie* court defined the "focal point" as the place where income is produced or services are provided to customers. *See* Baie v. Commissioner, 74 T.C. 105, 109 (1980).

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

288. *Id.* (Stevens, J., dissenting).

289. *See* I.R.C. § 280A(c)(1)(A)-(C) (1988).

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

291. *Id.* (Stevens, J., dissenting).

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scope of section 280A by effectively combining subsections (A) and (B).

The fact that Congress did not define the scope of the "principal place of business" exception does not mean that the courts should commingle these exceptions. This is the practical effect of both the "focal point" test and the "function and time" test. These two tests reconfigure section 280A to effectively include only two exceptions. This is not what Congress intended in enacting section 280A with its three exceptions.[292] Consequently, "[i]f the 'principal place of business' exception has meaning independent of the exception for home offices used to meet clients or patients, then the 'focal point' test [and the 'function and time' test] should give way to an analysis of all the facts and circumstances."[293]

B. The "Facts and Circumstances" Test: Consistent with Legislative History

In enacting section 280A, Congress sought to provide "definitive rules . . . as to the correct standard governing the deductibility of expenses attributable to . . . an office in the taxpayer's personal residence."[294] More importantly, Congress sought to prevent the transformation of nondeductible personal, living, and family expenses into deductible business expenses.[295] The situation that Congress attempted to remedy included employees who were able to deduct expenses attributable to a home office.[296] Both the "focal point" test and the "function and time" test not only remedy the situation contemplated by Congress, but also exclude nearly every taxpayer. In this regard, both the "focal point" test and the "function and time" test overstep the boundaries Congress intended.

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292. *See* H.R. REP. No. 658, 94th Cong., 1st Sess. 1, 160 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3579.

293. Soliman v. Commissioner, 94 T.C. 20, 25 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

294. S. REP. No. 938, 94th Cong., 2d Sess. 1, 147 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579.

295. *Id.* at 147, U.S.C.C.A.N. at 3580.

296. Drucker v. Commissioner, 79 T.C. 605, 617 (1982), *rev'd*, 715 F.2d 67,69 (2d Cir. 1983) (Wilbur, J., dissenting). Judge Wilbur explained:

> The vast majority of individuals, whether employed or self-employed, work at an office, school, hospital, store, factory, or other facility, Monday through Friday, 9 a.m. to 6 p.m., 50 weeks a year, holidays excepted. Yet prior to . . . section 280A, a lawyer employed by a corporation or Government agency was able to deduct a portion of the costs of his personal dwelling if he completed work at home that was not *finished at the office* . . . . Congress specifically focused on this situation . . . in fashioning the remedial legislation of section 280A and in using the words "principal place of business".

Id. (Wilbur, J., dissenting) (citations omitted) (emphasis added).

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On the other hand, the "facts and circumstances" test provides definitive rules which govern the deductibility of home office expenses. In *Soliman*, the Tax Court held that a taxpayer's home can be his principal place of business when the home office is "essential to his business, [the taxpayer] spends [a] substantial amount of time there, and there is no other location available to perform the office functions of the business."[297] Furthermore, the "facts and circumstances" test accomplishes Congress' main purpose in enacting section 280A — to prevent the conversion of nondeductible living expenses into deductible business expenses.[298]

A taxpayer who satisfies all of the requirements of section 280A, including the requirements of the "facts and circumstances" test, does not keep the home office "purely [as] a matter of personal convenience, comfort, or economy."[299] Instead, the taxpayer maintains the home office in order to satisfy a business necessity. Therefore, the "facts and circumstances" test more accurately reflects the purposes of section 280A.

C. Section 280A Applies To Both Employed and Self-Employed Taxpayers But Not To The Same Extent

Congress intended to prevent abuses of the home office deduction by employed rather than self-employed taxpayers. This is not to say that section 280A does not apply to self-employed taxpayers. Both the legislative history and the language of section 280A illustrate, however, that it does not apply to self-employed taxpayers to the same extent that it applies to employed taxpayers.

1. Legislative History

Most of the cases decided under the "appropriate and helpful" standard[300] have dealt with employed taxpayers.[301] The legislative his-

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297. *Soliman*, 94 T.C. at 29. The court also listed other factors that should be considered. These factors include: (1) the business exigencies for having a home office; (2) whether the functions performed in the home office are essential to the conduct of the business; (3) whether the home office is suitable to the essential business functions performed there; and (4) the appropriateness of the furnishings. *Id.*

298. S. REP. NO. 938, 94th Cong., 2d sess. at 147, *reprinted in* 1976 U.S.C.C.A.N. at 3579.

299. Sharon v. Commissioner, 66 T.C. 515, 523 (1976), *aff'd*, 591 F.2d 1273 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). The petitioner was an attorney employed by the IRS. The petitioner used one room in his apartment as his office. *Id.* at 517.

300. *See supra* notes 15-53 and accompanying text.

301. *See generally* Sharon v. Commissioner, 66 T.C. 515 (1976) (petitioner was employed as an attorney); Bodzin v. Commissioner, 60 T.C. 820 (1973) (petitioner employed as an attorney); Gino v. Commissioner, 60 T.C. 304 (1973) (petitioner employed as a high school teacher); Kroll v. Commissioner, 49 T.C.M. (CCH) 557 (1969) (petitioner employed as an outside sales-

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tory of section 280A cites cases that deal exclusively with employees.[302] The report states that "[c]ertain courts have held that a more liberal standard than that applied by the IRS is appropriate. Under these decisions, the expenses attributable to an office maintained *in an employee's residence* are deductible if the maintenance of the office is 'appropriate and helpful' to the taxpayers business . . . ."[303] In particular, the report cited *Bodzin v. Commissioner*.[304]

In *Bodzin*, the Fourth Circuit held that the expenses at issue were nondeductible personal expenses.[305] The court, therefore, did not have to decide whether the maintenance of the home office was "appropriate and helpful" to the taxpayer's business.[306] The Senate report noted that, in *Bodzin*, the Fourth Circuit "suggested that to obtain a deduction an *employee* would have to show that the *office provided by the employer* is not available at the time the *employee* uses the office . . . or that the employer's office is not suitable . . . ."[307] Therefore, Congress enacted section 280A in order to prevent the abuse of the home office deduction by employed taxpayers.

2. The Language of Section 280A

Self-employed taxpayers, however, are also included under section 280A. It is apparent from the language of section 280A that self-employed taxpayers are within the scope of the statute. Section 280A states that "in the case of a taxpayer who is *an individual* . . . no deduction . . . shall be allowed with respect to the use of a dwelling unit . . . used . . . during the year as a residence."[308] Therefore, any individual is included under section 280A whether employed or self-employed.

Self-employed taxpayers, however, are not treated identically to employed taxpayers. This is illustrated by the added requirement that

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man); Bischoff v. Commissioner, 25 T.C.M. (CCH) 538 (1966) (petitioner employed as a commercial artist).

302. S. REP. No. 938, 94th Cong., 2d Sess. at 145, *reprinted in* 1976 U.S.C.C.A.N. at 3580. This report also gives an example by stating:

> [I]f a university professor, *who is provided an office by his employer*, uses a den or some other room in his residence for the purpose of grading papers, preparing examinations or preparing classroom notes, an allocable portion of certain expenses might be claimed as a deduction even though only minor incremental expenses were incurred in order to perform these activities.

Id. at 147 (emphasis added).

303. *Id.* at 145 (emphasis added).

304. *Id.*; *see supra* notes 43-53 and accompanying text.

305. Bodzin v. Commissioner, 509 F.2d 679, 681 (6th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975).

306. *Id.*

307. S. REP. No. 938, 94th Cong., 2d Sess. 1, 145 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3577-78 (emphasis added).

308. I.R.C. § 280A(a) (1992) (emphasis added).

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"*[i]n the case of an employee*, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for *the convenience of the employer*."[309] If self-employed taxpayers were treated in a manner identical to employed taxpayers, Congress would have effectively omitted the statute's "convenience of employer" requirement. Omitting the "convenience of the employer" language would have made self-employed taxpayers and employed taxpayers subject to the same tests.

Congress, however, intended a different result depending upon whether the taxpayer is self-employed or employed by an outside source. The "focal point" test does not make this distinction. Instead, the "focal point" test treats self-employed taxpayers identically to employed taxpayers. The "focal point" test completely ignores the "convenience of employer" language found in section 280A(c). The "function and time" test also ignores this language. The "facts and circumstances" test, however, does distinguish between self-employed taxpayers and employed taxpayers. The "facts and circumstances" test prevents employed taxpayers from obtaining the deduction almost entirely.[310]

Unlike the "focal point" and "function and time" tests, the "facts and circumstances" test allows self-employed taxpayers greater flexibility. The principal place of business exception can have greater flexibility without conflicting with Congress' intent. This is due to the "convenience of the employer" requirement. This requirement, along with the criteria found in the "facts and circumstances" test, prevents employed taxpayers from abusing section 280A. This distinction is what Congress intended in enacting section 280A.

D. The Commissioner's Unfounded "Loophole"

In *Soliman*,[311] the Commissioner argued for the reversal of the Tax Court's decision adopting the "facts and circumstances" test.[312] The Commissioner believed that this liberal test "creates a loophole that every taxpayer, who engages in work related activities at home, will abuse."[313] In its analysis of Commissioner's position, the Fourth

309. *Id.* at § 280A(c)(1) (emphasis added).

310. Employed taxpayers will almost always fail the "facts and circumstances" test. Most employees have offices provided by their employers and will consequently spend less than a substantial amount of time in the home office. Furthermore, employees will ordinarily do their most essential work at the employer's place of business. Therefore, employees will almost always fail at least one criteria of the "facts and circumstances" test.

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

312. *Id.* at 54.

313. *Id.*

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Circuit held that this argument was unfounded.[314] Although the Tax Court and Fourth Circuit decisions in *Soliman* depart from the "focal point" test, the Supreme Court's adoption of the "facts and circumstances" test will not affect the availability of the home office deduction. The application of the "facts and circumstances" test to cases utilizing the "focal point" test demonstrates that the Commissioner's concerns are unfounded.

1. Application of the "Facts and Circumstances" Test to Cases Decided Prior to *Soliman*

a. Baie v. Commissioner

The application of the "facts and circumstances" test to the situation in *Baie v. Commissioner*[315] yields the same result as that reached by applying the "focal point" test. In *Baie*, the Tax Court held that, under the "focal point" test, the home office was not the principal place of business and that the petitioner could not, therefore, take a deduction under section 280A(c)(1)(A).[316] Similarly, under the "facts and circumstances" test, the petitioner would not have been able to deduct her home office expenses. In order to be deductible under section 280A, the home office must be used exclusively and regularly for business purposes.[317] Since the petitioner used her kitchen for personal purposes, she would fail to meet the requirements of section 280A(c)(1). Therefore, the expenses attributable to the kitchen do not meet the exclusivity requirement of section 280A(c)(1).[318]

Likewise, the petitioner would not have been able to deduct the expenses attributable to the business use of her spare bedroom. The petitioner failed to meet the requirement that her home office was essential to her business.[319] The petitioner's home office was not essential because "[a]t the retail establishment, supplies are delivered, bills are received, employees work and are supervised, and customers are served.[320] There, all products are packaged and sold, and all gross re-

314. *Id.* The Commissioner made these same arguments in Newi v. Commissioner, 432 F.2d 998, 1000 (2d Cir. 1970).

315. 74 T.C. 105 (1980); *see supra* notes 99-108 and accompanying text.

316. *Baie*, 74 T.C. at 109.

317. I.R.C. § 280A(c)(1) (1988).

318. *Baie*, 74 T.C. at 110 n.7.

319. In order to obtain a deduction under the facts and circumstances test: (1) the home office must be essential to the taxpayer's business; (2) there must be no other location available; and (3) a substantial amount of time must be spent in the home office. *See* Soliman v. Commissioner, 935 F.2d 52, 54 (4th Cir. 1991), *rev'd* 113 S. Ct. 701 (interim ed. 1993).

320. Drucker v. Commissioner, 79 T.C. 605, 618 (1982) (Wilbur, J., dissenting) (discussing *Baie* result under "facts and circumstances" test), *rev'd* 715 F.2d 67 (2d Cir. 1983).

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ceipts received.[321] Accordingly, that location is the principal place of business."[322] Consequently, the "facts and circumstances" test would yield the same result as the "focal point" test under the facts of *Baie*.

b. Jackson v. Commissioner

When the "facts and circumstances" test is applied to the situation before the Tax Court in *Jackson v. Commissioner*,[323] the result is identical to that reached under the "focal point" test. In *Jackson*, the Tax Court found that the petitioner's home office was not the "focal point" of her business activities.[324] Similarly, the deduction would also be disallowed under the "facts and circumstances" test because the petitioner would fail to meet two of the three criteria set forth in both the Tax Court and Fourth Circuit decisions in *Soliman*.[325] First, the home office was not essential to her business. In *Jackson*, the petitioner spent twelve to sixteen hours per week in the offices of her employer, Walker & Lee, dealing with customers and clients.[326] The petitioner's first contact with clients would be at the offices of Walker & Lee.[327] Therefore, the petitioner's most important work was accomplished at the offices of Walker & Lee. Consequently, the petitioner's home office was not essential to her business.

Second, there must not be another location available for the performance of the duties for which the home office is customarily used.[328] In *Jackson*, the petitioner had another place available to perform her business activities.[329] The petitioner had access to a room in Walker & Lee's office building which she utilized between twelve and sixteen hours per week.[330] The petitioner performed her most important functions in this employer-provided office. Finally, the taxpayer must spend a substantial amount of time in the home office.[331] Although the facts of *Jackson* do not state the number of hours the petitioner spent in her home office, this fact is not relevant because the petitioner could not satisfy the other two criteria. Therefore, under either the "focal point" test, or the "facts and circumstances" test, the petitioner would prop-

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321. *Id.* (Wilbur, J., dissenting).

322. *Id.* (Wilbur, J., dissenting).

323. 76 T.C. 696 (1981); *see supra* notes 109-119 and accompanying text.

324. *Jackson*, 76 T.C. at 699.

325. Soliman v. Commissioner, 94 T.C. 20, 25 (1990), *aff'd* 935 F.2d 52 (4th Cir. 1991), *rev'd* 113 S. Ct. 701 (interim ed. 1993); *see supra* notes 205-219 and accompanying text.

326. *Jackson*, 76 T.C. at 698.

327. *Id.*

328. Soliman v. Commisssioner, 935 F.2d 52, 54 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

329. *Id.*

330. *Jackson*, 76 T.C. at 698.

331. Soliman, 935 F.2d at 54.

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erly be denied any deduction for the expenses incurred in maintaining her home office.[332]

c. Pomarantz v. Commissioner

Pomarantz v. Commissioner[333] would, likewise, yield the same result under either the "focal point" test or the "facts and circumstances" test. The petitioner in *Pomarantz* was a physician who kept an office in his home because the hospital had failed to provide him with an office.[334] The petitioner would not meet the "facts and circumstances" requirement that the home office be essential to taxpayer's business. This is because very little activity for the benefit of the business was accomplished at the home office.[335]

The court found, however, that "Riverton General Hospital performed billing and accounting services on behalf of petitioner, and later his corporation, for a fee."[336] Therefore, the petitioner's most important function with respect to the home office — the performance of administrative and managerial duties — was completed by the hospital.[337] Consequently, the home office was not essential to the performance of administrative and managerial duties associated with the taxpayer's business. Additionally, the petitioner did not spend a substantial amount of time in his home office. The petitioner, on average, spent between three and five hours per week in his home office.[338] In *Soliman*, the Tax Court stated that Pomarantz "spent an insubstantial amount of time in his home office."[339]

Finally, the petitioner in *Pomarantz* would be able to satisfy the requirement that there be no other location available to do the work. This is irrelevant, however, since the petitioner in *Pomarantz* could not have satisfied all of the requirements of the "facts and circumstances"

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332. The petitioner also did not qualify for a deduction under § 280A(c)(1)(B). Section 280A(c)(1)(B) provides an exception to section 280A(a) when the taxpayer meets or deals with clients at the home office in the normal course of business. *See* I.R.C. § 280A(c)(1)(B). The petitioner did not use her home office on a regular basis to meet or deal with clients in the normal course of her business. *See Jackson*, 74 T.C. at 700. The court found that the "record fails to provide convincing evidence that clients in fact came to her home office other than on sporadic occasions." *Id.* at 698.

333. 52 T.M.C. (CCH) 599 (1986), *aff'd*, 867 F.2d 495 (9th Cir. 1988); *see also supra* notes 120-135 and accompanying text.

334. *Id.* at 600.

335. *Id.* The petitioner did a small amount of follow-up work by telephone, kept abreast of developments in his field, studied for a life support examination, and wrote and published a report on medical malpractice for emergency physicians. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* at 602.

339. Soliman v. Commissioner, 94 T.C. 20, 27 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), reh'g, 113 S. Ct. 707 (interim ed. 1993).

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test. The petitioner would, therefore, not have been entitled to a section 280A(c)(1)(A) deduction under either the "focal point" test or the "facts and circumstances" test.[340]

The argument by the Commissioner that the "facts and circumstances" test will "create a loophole that every taxpayer will abuse"[341] is unfounded. The most conclusive evidence that the "facts and circumstances" test will not create a "loophole" is revealed by examining the case law decided subsequent to the Tax Court's decision in *Soliman.*

2. Post-*Soliman* Cases and the Unfounded "Loophole"

If the "facts and circumstances" test does in fact create a loophole in the Code, the cases decided after *Soliman* would provide the best evidence supporting this argument. Since the Tax Court's decision in *Soliman*,[342] there have been approximately seven cases dealing with the propriety of home office deductions.[343] Only two of the seven cases held that the expenses were deductible under the "facts and circumstances" test. This indicates that the "facts and circumstances" test does not, as the Commissioner argued, "create a loophole that every taxpayer will abuse."[344]

Three of the seven cases illustrate that the "facts and circumstances" test does not create a "loophole." The first case illustrates that the taxpayer must meet all of the requirements of section 280A(c)(1) in order to obtain the deduction. The second case illustrates that, when the taxpayer is self-employed, the deduction becomes more accessible. The third case points out that, even if the taxpayer is self-employed, the deduction is still very difficult to obtain, although slightly more accessible.

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340. For other cases that would be decided using the same under the two tests, see Cadwallader v. Commissioner, 57 T.C.M. (CCH) 1030, *aff'd*, 919 F.2d 1273 (7th Cir. 1990) (petitioner had three offices on campus and, thus, had another place available to do his work); Trussel v. Commissioner, 45 T.C.M. (CCH) 190 (1982) (petitioner does not satisfy the "no other place available" test and also fails the gross income limitation); Cristo v. Commissioner, 44 T.C.M. (CCH) 1057 (1982) (petitioner does not satisfy the regular basis test).

341. Soliman v. Commissioner, 935 F.2d 52, 54, *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

342. 94 T.C. at 20.

343. *See generally* McDonald v. Commissioner, 61 T.C.M. (CCH) 1876 (1991); Mathes v. Commissioner, 60 T.C.M. (CCH) 704 (1990); Shore v. Commissioner, 59 T.C.M. (CCH) 762 (1990); Starrett v. Commissioner, 59 T.C.M. (CCH) 334 (1990); Hamacher v. Commissioner, 94 T.C. 348 (1990); Hoye v. Commissioner, 58 T.C.M. (CCH) 1338 (1990); Kahaku v. Commissioner, 58 T.C.M. (CCH) 1247 (1990).

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344. *Soliman*, 94 T.C. at 20.

a. Mathes v. Commissioner

In *Mathes v. Commissioner*,[345] the petitioner, W. Michael Mathes, taught history at the University of San Francisco.[346] In addition to his normal classroom activities, Mathes spent a substantial amount of time engaged in research and writing in his specialized field.[347] Mathes had access to three area libraries, copy machines, a microfilm reader, and word processing units.[348] The University provided Mathes with office space,[349] but because of limited space and other reasons,[350] he established an office in his home.[351] Mathes purchased a copy machine, four film readers, and his own word processor.[352] Mathes claimed a deduction for his home office and related expenses.[353]

The IRS disallowed all deductions except a small amount of employee business expenses.[354] The IRS concluded that Mathes was not entitled to a home office deduction because his home office was not the "focal point" of his activities.[355] The IRS also concluded that Mathes did not maintain the home office for the convenience of his employer.[356] The Tax Court, while not reaching the issue of whether the petitioner's home office was his principal place business,[357] held that Mathes did

345. 60 T.M.C. (CCH) 704 (1990).

346. *Id.* at 705. Mathes specialized in colonial Mexican history. *Id.* Mathes spent approximately 25 hours per week at the University. *Id.* He taught four classes that met once a week on Tuesdays and Thursdays. *Id.*

347. *Id.*

348. *Id.* The copy machines, microfilm readers, and word processing units were also available to students. *Id.*

349. *Id.* The office on campus was sufficient in size for Mathes to perform some research. *Id.* It would not, however, "accommodate the extensive" amount of material he used in his research and writing. *Id.* Mathes could not have obtained extra space even if he had requested it. *Id.*

350. *Id.* Mathes perceived other shortcomings in the University's facilities as well. *Id.* Many times there were long waits to gain access to the copy machines, and frequently the machines did not work. *Id.* Mathes also needed access to microfilm readers and, at various times, the library would be closed. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* Mathes claimed additional deductions for library and microfilm depreciation, maintenance and utilities, supplies, a telephone, and travel for research. *Id.*

354. *Id.*

355. *Id.* at 707.

356. *Id.*

357. *Id.* The *Mathes* court declared:

> Although the briefs filed in [*Soliman*] discuss at length the applicability of the 'focal point" test, we think it unnecessary to reach the issue of whether petitioner's home office qualifies as his principal place of business under the new test enunciated in *Soliman* because petitioner has failed to show that his home office was maintained for the convenience of his employer.

Id. (quoting Soliman v. Commissioner, 94 T.C. 20 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993)).

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not maintain his home office for the convenience of his employer.[358] The court emphasized that "[Mathes] could have concluded his research at the University library or at any libraries to which he had access." [359] The court further noted that "[Mathes] chose not to utilize these facilities and services because he did not wish to 'get in line'. . . ."[360] Thus, the Tax Court applies section 280A very strictly when the taxpayer is an employee. The Tax Court is not as rigid, however, in its application of section 280A when the taxpayer is self-employed.

b. Kahaku v. Commissioner

In *Kahaku v. Commissioner*,[361] the petitioner, Leroy Kahaku, was a self-employed professional guitarist.[362] Kahaku performed at Nick's Fishmarket restaurant (Nick's) for four hours either two or three nights per week.[363] Nick's did not allow Kahaku to practice or maintain an office at the restaurant.[364] Instead, Kahaku set aside one room in his home as an office and a studio.[365] Kahaku maintained all of his business records in this home office.[366] Kahaku "used the room exclusively" for the purpose of practicing and listening to music.[367] There was no social or personal use of the room.[368] Since Kahaku believed that his home was his principal place of business, he deducted automobile expenses on his income tax return.[369]

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358. *Id.* at 708. The court stated that "[Mathes'] home office was not for the convenience of his employer, but rather for his personal convenience." *Id.*; *see also* Hamacher v. Commissioner, 94 T.C. 348 (1990) (petitioner had another office and did not maintain the home office for the convenience of his employer); Starrett v. Commissioner, 59 T.C.M. (CCH) 1338 (1990) (petitioner had an office provided by his employer).

359. *Mathes*, 60 T.C.M. (CCH) at 708.

360. *Id.*

361. 58 T.C.M. (CCH) 1247 (1990). The court, in this case, dealt with the issue of whether Kahaku could deduct certain automobile expenses under § 162(a). *Id.* at 1247. The court first dealt with the threshold issue of whether his home office was his principal place of business because the deductibility of the expenses depended entirely upon this issue. *Id.* at 1248; *see also* Hoye v. Commissioner, 58 T.C.M. (CCH) 1338 (1990) (home office deduction allowed under the "facts and circumstances" test).

362. *Kahaku*, 58 T.C.M. (CCH) at 1247. Kahaku did not engage in any other occupation. *Id.*

363. *Id.* at 1248. Kahaku performed either two or three nights per week during 1983 and 1984. *Id.* at 1247.

364. *Id.* at 1248.

365. *Id.*

366. *Id.* Kahaku furnished the room with a stool, desk, couch, cabinet, telephone, guitars, stereo components, tapes, records, sheet music, and book music. Kahaku practiced approximately thirty hours per week in this room. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

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The IRS disallowed the automobile expense deduction, maintaining that Kahaku's principal place of business was the restaurant.[370] The Tax Court held that, under the "facts and circumstances" test, Kahaku's home office was his principal place of business and that the automobile expense deduction was, therefore, proper under section 162(a).[371]

The court noted that "[i]n order to carry on his business as a professional guitarist, it was essential for [Kahaku] to keep abreast of current music and record practice sessions . . . which could be studied and supplied to potential customers."[372] The court also gave weight to the fact that Kahaku did not have another place to carry on his business.[373] Finally, the court noted that "[s]ection 280A was not enacted to compel a taxpayer to rent office space rather than to work out of his own home."[374] Thus, with respect to a self-employed taxpayer, the Tax Court is not rigid in it application of section 280A. Not all self-employed taxpayers, however, may utilize section 280A under the "facts and circumstances" test.

c. McDonald v. Commissioner

In *McDonald v. Commissioner*,[375] the petitioner, Jimmy McDonald, owned and operated a television, radio, and stereo repair shop.[376] McDonald leased his repair shop space and employed five or six employees.[377] McDonald's wife, who worked for the business on a part-time basis, accomplished most of her work at home.[378] The work consisted of bookkeeping, paying bills, and preparing an employee pay-

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370. *Kahaku*, 58 T.C. (CCH) at 1248. The IRS did not dispute the fact that Kahaku's sole business was that of a professional guitarist or that he used his home office exclusively and regularly in his business. *Id.*

371. *Id.* at 1249. The *Kahaku* court stated:

> Until recently, we applied what was known as the "focal point" test to determine whether a taxpayer's home office constituted his "principal place of business" within the meaning of section 280A(c)(1)(A). [W]e abandoned the "focal point" test where, as here, a taxpayer's only office is his home office, and instead held it appropriate to apply a "facts and circumstances" test.

Id. at 1248-49 (citations omitted).

372. *Id.* at 1249.

373. *Id.* The court stated that "[Kahaku] had no other place other than his home office in which to manage his business." *Id.*

374. *Id.*

375. 61 T.C.M. (CCH) 1876 (1991); *see also* Shore v. Commissioner, 59 T.C.M. (CCH) 762 (1990)(petitioner failed to prove the criteria of the "facts and circumstances" test).

376. *McDonald*, 61 T.C.M. (CCH) at 1876. McDonald operated this business as a sole proprietor. *Id.*

377. *Id.*

378. *Id.*

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roll.[379] McDonald stored the business' files, books, records, and supplies in the home office.[380] All of the repair work, however, was done at the shop.[381] Furthermore, all of the shop's customers called for their merchandise there and all deliveries and pickups were made to and from the shop.[382]

The IRS disallowed the deductions taken by the McDonalds.[383] The Tax court held that, under the "facts and circumstances" test, the home office was not the McDonalds' principal place of business.[384] The court found that "considering all the facts and circumstances . . . [the McDonalds'] home-office [does] not constitute their principal place of business."[385] The court stated that "[w]hile [the McDonalds'] home-office was obviously a function of their business, it was clearly incidental and secondary to the commercial location, where all the repair work was done, where customers reported to deliver and pick up their merchandise, and where the business was conducted."[386] Therefore, although the "facts and circumstances" test is generally more lenient than the "focal point" test, utilizing section 280A is still very difficult.

E. *Application of the Function and Time Test to* Kahaku

The application of the "function and time" test to the facts of *Kahaku* demonstrates the confusion that the test yields.[387] This is just one of the many cases in which courts will be at a loss with respect to the issue of which factor of the "function and time" test takes precedence.[388] Applying the "function and time" test to *Kahaku* demonstrates that courts, attorneys, certified public accountants, and taxpay-

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379. *Id.* McDonald's wife worked at home because the leased space was limited. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* This disallowance affected McDonald's tax liability in two ways. First, the net income of the business increased, thereby increasing self-employed tax under section 1401(a). Second, McDonald could not receive the full benefit of the miscellaneous expense deduction due to a two percent limitation. *Id.*

384. *Id.* at 1878. The court stated that "[t]he determination of the taxpayer's principal place of business is of fact, dependent upon a consideration of 'all the facts and circumstances.' " *Id.* (quoting Soliman v. Commissioner, 94 T.C. 20, 25 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993)).

385. *McDonald*, 61 T.C. at 1876.

386. *Id.*

387. The only other case to allow a deduction under the "facts and circumstances" test after the Tax Court's decision in *Soliman* was *Hoye v. Commissioner*, 58 T.C.M. (CCH) 1338 (1990). The "function and time" test would yield the same result because the Tax Court found that Hoye was conducting a separate business from that of treating patients at the hospital. *Id.* at 1344. Since Hoye was conducting a separate business and the basement of his home was the only location of this business, there was no need to utilize the "function and time" test.

388. Commissioner v. Soliman, 113 S. Ct. 701, 709 (interim ed. 1993) (Thomas and Scalia, JJ., concurring).

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ers will be unable to determine the principal place of business with confidence.

Kahaku, a self-employed guitarist, performed at Nick's Fishmarket Restaurant for four hours,[389] three nights a week during 1983.[390] Since Nick's did not provide a place for Kahaku to practice, Kahaku set aside one room in his home as an office.[391] Kahaku practiced approximately thirty hours per week in this office.[392]

The first step in applying the "function and time" test is to determine the relative importance of the activities performed at each location.[393] The Supreme Court stated that "the point where . . . services are delivered must be given *great weight* in determining the place where the most important functions are performed."[394] Furthermore, the Court stated that "[i]f the nature of the trade or profession requires the taxpayer . . . to deliver . . . services to a customer, the place where that contact occurs is often an important indicator of the principal place of business."[395] Therefore, in *Kahaku*, the place where Kahaku provided his service (Nick's) should be given great weight in determining the principal place of business. This gives less weight to the activities performed at the home office which are just as important or even more important than the activities actually performed at Nick's.

The second step in applying the "function and time" test is to compare the amount of time spent at each business location.[396] Kahaku spent approximately forty-three hours a week practicing at his home office and performing at Nick's.[397] Twelve hours of this time were spent actually performing at Nick's.[398] Therefore, approximately twenty-nine percent of Kahaku's time was spent actually performing with the remaining seventy-one percent of his time spent practicing in his home office. In *Soliman*, the Supreme Court did not provide any guidance as to which factor takes precedence. The Supreme Court also failed to

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389. Kahaku v. Commissioner, 58 T.C.M. (CCH) 1247, 1248 (1990).

390. *Id.* at 1247.

391. *Id.* at 1248.

392. *Id.* Kahaku used the room exclusively for the purpose of practicing and listening to music. *Id.* Kahaku also maintained his business records in this office. *Id.*

393. Commissioner v. Soliman, 113 S. Ct. 701, 706 (interim ed. 1993).

394. *Id.* (emphasis added).

395. *Id.*

396. *Id.*

397. *See* Kahaku v. Commissioner, 58 T.C.M. (CCH) 1247, 1248 (1990). Kahaku's 42 hour work-week in 1983 included 30 hours of practicing and 12 hours of performing. *Id.*

398. *Id.*

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provide guidance on the issue of how much of one factor is sufficient to overcome the other factor.[399]

If the comparison of the function performed at each location ("step one") takes precedence over the comparison of the time spent at each location ("step two"), the status of Kahaku's home office is very difficult to determine. In applying step one, Nick's should be given great weight in determining Kahaku's principal place of business because it was where Kahaku provided his service. Therefore, if step one takes precedence, Nick's would seem to be Kahaku's principal place of business. Step two, however, still needs to be examined even though it is given less weight.

Kahaku spent three times more hours at his home office than he did performing at Nick's. Thus, a comparison of the amount of time spent at each location suggests that the home office was Kahaku's principal place of business. In applying this test, however, courts will not know whether the amount of time spent in the home office is sufficient to overcome the great weight given to locations such as Nick's. Consequently, courts will be forced to guess as to the taxpayer's principal place of business.

If step two takes precedence, the outcome will be more easily determined. Since step two takes precedence and the amount of time spent at the home office is substantial, the home office would properly be considered Kahaku's principal place of business. The Supreme Court's decision in *Soliman* did not provide a clear test for determining the principal place of business under section 280A(c)(1)(A) because the Court did not identify which factor takes precedence in the application of the "function and time" test. Thus, although the Supreme Court "granted certiorari to clarify a recurring question of tax law . . . [u]nfortunately, this issue is no clearer today that it was before [the Supreme Court] granted certiorari."[400]

F. Application of the Focal Point Test to Soliman v. Commissioner

The outcome of the Tax Court and Fourth Circuit decisions in *Soliman*[401] would change dramatically if the "focal point" test were

399. As this case demonstrates, step one of the function test yields the conclusion that Nick's is the principal place of business because it is the place where the services were provided. *See* Soliman v. Commissioner, 113 S. Ct. 701, 706 (interim ed. 1993). Kahaku, however, spent a substantial amount of time in his home office. *Kahaku*, 58 T.C.M. (CCH) at 1248. The question is how much time in the home office is enough to overcome the great weight given to Nick's.

400. *Soliman*, 113 S. Ct. at 711 (Thomas and Scalia, JJ., concurring).

401. 94 T.C. 20 (1990), *aff'd*, 935 F.2d 52 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993).

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applied.[402] The "focal point" test determines the principal place of business by identifying the place where services are provided to customers or where income is produced.[403] In *Soliman*, the different hospitals were the places the where petitioner provided his services to his patients.[404] Therefore, without reviewing the importance of the activities done at the home office, the petitioner was denied the deduction.[405] Consequently, the "focal point" test places an extreme burden upon the taxpayer which the taxpayer must overcome in order to obtain the section 280A deduction.

G. Evidence Supporting the Correctness of the Respective Tests

1. Focal Point

The legislative history and the Commissioner's regulations do not provide any "guidance as to the scope of the 'principal place of business' concept in the context of section 280A."[406] The *Baie* court interpreted the scope of the principal place of business exception to be the "focal point" of the taxpayer's activity.[407] The "focal point" test does have some arguments which support its application. First, the "focal point" test does have precedential value. The Tax Court has consistently applied this test since it was first promulgated in *Baie v. Commissioner*.[408] The decision in *Soliman* was the first deviation from the "focal point" test in ten years.[409]

Second, the placement of section 280A within the Internal Revenue Code gives it a presumption of validity.[410] Congress placed section 280A in a section titled "Items Not Deductible."[411] Home office deductions are not deductible unless the taxpayer meets certain specified ex-

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402. The application of the "focal point" test to the three cases that utilized the "where the work is predominantly performed" test, however, would result the Tax Court reaching the same conclusion. *See supra* notes 83-135 and accompanying text. In other words, the original Tax Court decisions applied the "focal point" test and concluded that the taxpayers were not entitled to the deduction. *See supra* notes 83-135 and accompanying text.

403. *See* Baie v. Commissioner, 74 T.C. 105, 109 nn. 5-6 (1980).

404. *Soliman*, 94 T.C. at 21.

405. *Id.* at 33 (Nims, C.J., dissenting). Chief Justice Nims stated that "it is indisputable that Dr. Soliman's activities do not meet the unglossed focal point test, nor do they appear to meet the 'time and importance' modification . . . ." *Id.* (Nims, C.J., dissenting).

406. *Baie*, 74 T.C. at 109.

407. *Id.* The court stated that "[w]e therefore take it that what Congress had in mind was the focal point of a taxpayer's activities . . . ." *Id.*

408. *See id.* at 105.

409. This does not include the appellate decisions in *Drucker*, *Weissman*, and *Meiers*. *See supra* notes 136-89 and accompanying text.

410. *See* Commissioner v. Idaho Power Co., 418 U.S. 1, 17 (1971).

411. I.R.C. §§ 261-280H (1980).

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ceptions.[412] Congress could have placed section 280A in a section titled "Itemized Deductions for Individuals and Corporations."[413] By including section 280A under the heading "Items Not Deductible," Congress created a presumption of validity which applies to the "focal point" test.

The argument that the "focal point" test is the correct test because of its placement within the Code, however, is seriously misplaced. This argument is invalid because of section 7806(b) of the Internal Revenue Code. Section 7806(b) states:

> (b) Arrangement and classification. - No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.[414]

In enacting section 7806(b), Congress demonstrated that the placement of a section within the Code is not conclusive evidence of its meaning. Thus, the argument that the "focal point" test is correct because of its placement within the Code is seriously misplaced.

Finally, the "focal point" test is advantageous in that it is a bright line test. This eases the test's application and makes it suitable to the facts of virtually any case. If the facts show that the taxpayer did not produce income or provide services at the home office, the taxpayer is not entitled to a deduction under section 280A.[415] Thus, the test provides the advantage of efficiency of judicial administration. Under the "focal point" test, many taxpayers will not litigate the disallowance of a deduction by the IRS. If a taxpayer does decide to litigate, the court can quickly decide the case. The "facts and circumstances" test, however, requires the judge to balance many factors and is thus a more difficult test to administer. Therefore, a bright line test, such as the "focal point test," is advantageous despite its harsh results.

2. Function and Time

The "function and time" test is supported by very little evidence. The Supreme Court premised its adoption of the "function and time"

412. I.R.C. § 280A(c)(1)(A)-(C) (1988).
413. I.R.C. §§ 161-196 (1988).
414. I.R.C. § 7806(b) (1988).
415. *See* Baie v. Commissioner, 74 T.C. 105, 109 (1980).

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test on the language of section 280A.[416] The Court examined the ordinary and everyday meaning of the phrase "principal place of business." The Court stated that "the common sense meaning of 'principal' suggests that a comparison of locations must be undertaken."[417] Justice Blackmun, in his concurring opinion, stated that the principal place of business "invites and compels a comparison."[418] Therefore, the Court relied only on the wording of section 280A. Since the term "principal place of business" is unclear, it is necessary to examine the legislative history of section 280A. The legislative history strongly supports the application of the "facts and circumstances" test.

3. Facts and Circumstances

The "facts and circumstances" test is supported by strong evidence. Approximately four months after *Baie* was decided, the IRS submitted a proposed regulation to the Commissioner for approval.[419] The amended proposed regulation stated that "[w]hen a taxpayer engages in a single trade or business at more than one location, it is necessary to determine the taxpayer's principal place of business *in light of all the facts and circumstances*."[420] In *Soliman,* the Fourth Circuit stated that:

> [w]hile it is true that the proposed regulation was not binding on the tax court or this court, the regulation does evidence a policy to allow "home office" deductions for taxpayers who maintain "legitimate" home offices, even if the taxpayer does not spend the majority of his time in the home office.[421]

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416. *See* § 280A(c)(1)(A).

417. Commissioner v. Soliman, 113 S. Ct. 701, 706 (interim ed. 1993).

418. *Id.* at 708 (Blackmun, J., concurring).

419. Prop. Treas. Reg. § 1.280A, 45 Fed. Reg. 52,399 (1980) (as amended by Prop. Treas. Reg. § 1.280A, 48 Fed. Reg. 33,320 (1983)).

420. Prop. Treas. Reg. § 1.280A-2, 45 Fed. Reg. at 52,403 (as amended by Prop. Treas. Reg. § 1.280A-2, 48 Fed. Reg. at 33,324 (1983)) (emphasis added). The amended proposed regulation states:

> Among the facts and circumstances to be taken into account in making this determination are the following:
>
> [i] The portion of the total income from the business which is attributable to activities at each location;
>
> [ii] The amount of time spent in activities related to that business at each location;
>
> [iii] The facilities available to the taxpayer at each location for purposes of that business.

Prop. Treas. Reg. § 1.280A-2, 48 Fed. Reg. at 33,324.

421. Soliman v. Commissioner, 935 F.2d 52, 54-55 (4th Cir. 1991), *rev'd*, 113 S. Ct. 701 (interim ed. 1993). The original proposed regulation stated that "[w]hen a taxpayer engages in business activities at more than one location, it is necessary to determine the principal place of the taxpayer's overall business activity *in light of all the facts and circumstances*." Prop. Treas. Reg. § 1.280A-2, 45 Fed Reg. at 52,403 (emphasis added).

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Consequently, the "facts and circumstances" test is supported by both the legislative history[422] and a proposed IRS regulation.

H. The Facts and Circumstances Test Provides Better Public Policy

For all practical purposes, both the "focal point" and the "function and time" tests prevent taxpayers from utilizing section 280A deductions. In effect, both tests force taxpayers who desire to maintain a home office to do one of two things: (1) meet or deal with clients, patients, or customers at the home office in order to obtain a deduction under section 280A(c)(1)(B), or (2) rent or lease office space in order to obtain an ordinary and necessary business expense deduction under section 162(a). "Section 280A was not enacted to compel a taxpayer to rent office space rather than work out of his own home."[423] The only other choice is to meet or deal with clients, patients, or customers in the home office. If a taxpayer rents an office for business purposes, the taxpayer would indisputably be entitled to deduct the rental payments as a section 162(a) business expense. These expenses would be deductible despite the fact that only administrative and managerial activities are accomplished there.

Both the "focal point" test and the "function and time" test are unjust deterrents which prevent taxpayers from utilizing the section 280A deduction. Section 280A already sets forth such stringent requirements that most taxpayers will find the process of claiming the deduction too cumbersome a task to undertake in order to obtain the benefit derived. The "facts and circumstances" test, along with the other requirements,[424] is less cumbersome. In addition to being less cumbersome, the "facts and circumstances" test also satisfies two major goals of section 280A: (1) ensuring that the deductions are for legitimate business expenses, and (2) allowing more taxpayers to utilize the deduction while at the same time prohibiting the conversion of nondeductible living expenses into deductible business expenses.[425] Congress did not intend to eliminate the home office deduction. This is the effect, however, of both the "focal point" test and the "function and time" test. The "facts and circumstances" test provides the best public policy.

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422. See *supra notes* 294-99 and accompanying text for a discussion of how the "facts and circumstances" test more accurately represents the intent of Congress.

423. *Soliman*, 935 F.2d at 54-55.

424. The other requirements are that the home office must be used exclusively and regularly. *See* I.R.C. § 280A(c)(1). Also, in the case of an employee, the home office must be for the convenience of the employer. *Id.*

425. S. REP. NO. 938, 94th Cong., 2d Sess. 1, 147 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3579.

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The Supreme Court should, therefore, reconsider its decision in *Soliman* and adopt the "facts and circumstances" test.

V. Conclusion

In *Soliman v. Commissioner*, the Fourth Circuit Court of Appeals upheld the Tax Court's application of the "facts and circumstances" test to determine the principal place of business for purposes of section 280A of the Internal Revenue Code. In deciding this issue, the court ruled that an examination of the surrounding "facts and circumstances" is the proper standard to be applied in determining a taxpayer's principal place of business. The Supreme Court in *Soliman*, however, decided to adopt its own "function and time" test, and thus rejected the Fourth Circuit's approach.

The "facts and circumstances" test does not create a loophole which taxpayers may abuse. Section 280A has sufficient safeguards which prevent taxpayer abuse. Furthermore, the test is in accordance with the legislative intent of Congress at the time of its enactment. The test also allows more taxpayers to utilize its benefits, while at the same time providing reassurance to the IRS that the deduction is for a legitimate business expense. Finally, public policy dictates the abrogation of the "focal point" test and the "function and time" test. These two tests, as a practical matter, erase section 280A from the Internal Revenue Code. The "facts and circumstances" test, however, allows section 280A to accomplish its goals while at the same time allowing the taxpayer to utilize its deduction.

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