

STUDENT COMMENTS

THE CHILD CARE DEDUCTION: ISSUES RAISED BY MICHAEL AND ELIZABETH NAMMACK AND THE PENDING AMENDMENT TO SECTION 214

An imminent Tax Court case¹ has provoked public attention because of its focus on Section 214 of the Internal Revenue Code.²

¹ Michael T. and Elizabeth B. Nammack, No. 1929-67 (Tax Court, filed April 19, 1967).

² Int. Rev. Code of 1954, § 214, provides:

(a) General rule.—There shall be allowed as a deduction expenses paid during the taxable year by a taxpayer who is a woman or widower, or is a husband whose wife is incapacitated or is institutionalized, for the care of one or more dependents (as defined in subsection (d) (1)), but only if such care is for the purpose of enabling the taxpayer to be gainfully employed.

(b) Limitations.—

(1) Dollar limit.—

(A) Except as provided in subparagraph (B), the deduction under subsection (a) shall not exceed \$600 for any taxable year.

(B) The \$600 limit of subparagraph (A) shall be increased (to an amount not above \$900) by the amount of expenses incurred by the taxpayer for any period during which the taxpayer had 2 or more dependents.

(2) Working wives and husbands with incapacitated wives.—In the case of a woman who is married and in the case of a husband whose wife is incapacitated, the deduction under subsection (a)—

(A) shall not be allowed unless the taxpayer and his spouse file a joint return for the taxable year, and

(B) shall be reduced by the amount (if any) by which the adjusted gross income of the taxpayer and his spouse exceeds \$6,000. This paragraph shall not apply, in the case of a woman who is married, to expenses incurred while her husband is incapable of self-support because mentally or physically defective, or, in the case of a husband whose wife is incapacitated, to expenses incurred while his wife is institutionalized if such institutionalization is for a period of at least 90 consecutive days (whether or not within one taxable year) or a shorter period if terminated by her death.

(3) Certain payments not taken into account.—Subsection (a) shall not apply to any amount paid to an individual with respect to whom the taxpayer is allowed for his taxable year a deduction under section 151 (relating to deductions for personal exemptions).

(c) Special rule where wife is incapacitated or institutionalized.—In the case of a husband whose wife is incapacitated or is institutionalized, the deduction under subsection (a) shall be allowed only for expenses incurred while the wife was incapacitated or institutionalized (as the case may be) for a period of at least 90 consecutive days (whether or not within one taxable year) or a shorter period if terminated by her death.

(d) Definitions.—For purposes of this section—

(1) Dependent.—The term "dependent" means a person with respect to whom the taxpayer is entitled to an exemption under section 151(e) (1)—

(A) who has not attained the age of 13 years and who (within the

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Section 214 allows a deduction, popularly called the child care deduction, for costs incurred in the care of certain dependents, including adults unable to care for themselves as well as children. The deduction is available only to certain classes of taxpayers for expenses incurred in order to seek or hold employment. Its availability is limited further by statutory restrictions on the total amount deductible and by the total joint income of working married couples who may claim the deduction.

Petitioner Elizabeth Nammack seeks court relief from the \$600 limit imposed on her deduction for the care of one dependent, claiming a deduction for the full cost of child care, \$2860, that she incurred in order to hold a \$4934 job.³ She apparently will argue that child care is not a unique category of expense whose deductibility is subject to the arbitrary dollar limits imposed by section 214, but is rather a form of business expense and therefore should be subject only to the limitation of reasonableness imposed on business expenses.⁴ It appears that she will also argue that the dollar limits of section 214 cause unconstitutional treatment of women: since women are customarily charged with the care of children, such limits operate to deny them equal opportunity with men to seek and hold employment.

A comparable constitutional question is raised by the pending appeal of another Tax Court case, *Charles E. Moritz*.⁵ Taxpayer

the meaning of section 152) is a son, stepson, daughter, or step-daughter of the taxpayer; or

(B) who is physically or mentally incapable of caring for himself.

(2) Widower.—The term "widower" includes an unmarried individual who is legally separated from his spouse under a decree of divorce or of separate maintenance.

(3) Incapacitated wife.—A wife shall be considered incapacitated only (A) while she is incapable of caring for herself because mentally or physically defective, or (B) while she is institutionalized.

(4) Institutionalized wife.—A wife shall be considered institutionalized only while she is, for the purpose of receiving medical care or treatment, an inpatient, resident, or inmate of a public or private hospital, sanitarium, or other similar institution.

(5) Determination of status.—A woman shall not be considered as married if—

(A) she is legally separated from her spouse under a decree of divorce or of separate maintenance at the close of the taxable year, or

(B) she has been deserted by her spouse, does not know his whereabouts (and has not known his whereabouts at any time during the taxable year), and has applied to a court of competent jurisdiction for appropriate process to compel him to pay support or otherwise to comply with the law or a judicial order, as determined under regulations prescribed by the Secretary or his delegate.

³ Petitioner's Brief at 1-4, 22-29, 37-55. See also *Boston Globe*, May 26, 1971, at 22, col. 1.

⁴ See text *infra* at notes 11-14 for discussion of the business expense deduction.

⁵ 55 T.C. No. 14 (Oct. 22, 1970), on appeal to the 10th Circuit, discussed in Note, *Sex and the Single Man: Discrimination in the Dependent Care Deduction*, 5 Valpariso L. Rev. 415 (1971).

Moritz is a male, past and present unmarried; the deduction he claims for the care of an invalid mother is allowed to any single woman or widowed or divorced man but is not available to males of his class.⁶ The denial of the deduction, he argues, constitutes a violation of due process.

The questions raised in both cases appear especially urgent in light of recent congressional action on section 214. Unamended since 1964, it has been the target of at least thirteen bills introduced in the 92d Congress,⁷ and, as this comment is written, the House has passed an amendment to the statute as part of H.R. 1, the major social security-welfare bill. The amendment would raise both the dollar limit of the available deduction and the limit on the joint income of working couples who may claim the whole deduction,⁸ but it includes none of the sweeping changes proposed by several of the thirteen bills bypassed by Ways and Means in favor of H.R. 1. One of those bills recommended allowing the deduction as a business expense,⁹ while others proposed removing all limitations on eligibility and on the amount deductible.¹⁰ Hence, the pending amendment suggests a negative legislative response to the issues raised by the *Nammack* and *Moritz* cases.

This comment will examine various grounds for judicial response to the issues suggested by the *Nammack* petition and the *Moritz* appeal. It will consider the possibility of judicial reclassification of child care costs as a business expense and of judicial finding that treatment of certain classes of taxpayers is unconstitutional. It will also consider the legislative policy underlying section 214, analyze the effectiveness of the present statute and the pending amendment as instruments of that policy, and note several alternatives to the pending amendment.

⁶ Int. Rev. Code of 1954, § 214(a), (d) (2).

⁷ S. 1632, H.R. 118, H.R. 845, H.R. 1478, H.R. 3608, H.R. 3991, H.R. 4206, H.R. 4371, H.R. 6377, H.R. 7026, H.R. 7283, H.R. 7622: all bills of the 92d Cong., 1st Sess. (1971).

⁸ H.R. 1, 92d Cong., 1st Sess. (A Bill to Amend the Social Security Act) was passed by the House on June 22, 1971. Title V, pt. D, Liberalization of Income Tax Treatment of Child Care Expenses and Retirement Income, would raise the limits on the deduction from the currently allowed \$600 for one dependent and \$900 for more than one, to \$750 for one dependent, \$1125 for two dependents, and \$1500 for three or more. It would also raise from \$6000 to \$12,000 the limit on joint income of working couples who may claim the full deduction. The deduction to which such a couple would otherwise be entitled would be reduced by one dollar for every dollar of joint income above the statutory limit.

⁹ H.R. 118, 92d Cong., 1st Sess. (1971).

¹⁰ H.R. 3608 proposed extending the deduction to men who are not married; H.R. 4206 and H.R. 4371 proposed eliminating the joint income ceiling; H.R. 6377 proposed eliminating limits on eligibility and on amounts deductible. All of these are bills of the 92d Cong., 1st Sess. (1971).

I. CHILD CARE COSTS: BUSINESS OR PERSONAL?

The *Nammack* argument rests on the reclassification of child care costs as business rather than personal expenses and hence deductible under the broad provisions of section 162. That section implements the fundamental tax policy of taxing only net income¹¹ by allowing the deduction of all "ordinary and necessary" expenses paid or incurred during the taxable year in carrying on any trade or business.¹² A fundamental corollary to that policy is found in Section 262, which provides that no deduction shall be allowed for personal, living, or family expenses except as otherwise expressly provided in the Code.¹³ Section 166 explicitly subjects all business and trade deductions to the section 262 rule.¹⁴ The only exceptions to that rule, a series of quasi-personal deductions allowed for various policy reasons, are grouped together at sections 213-217.¹⁵ Successive legislative amendments, administrative regulations and court interpretations have consistently implemented both the basic policy and its corollary.¹⁶

Unfortunately for petitioners such as Mrs. Nammack, neither direct precedent from the child care decisions, nor analogy with the tests and decisions of other cases classifying business and personal expenses, nor the legislative history of section 214 suggests grounds for classifying the cost of child care as a business expense.

¹¹ See, e.g., *Commissioner v. Tellier*, 383 U.S. 687, 691 (1966); see commentary in Ellett and Rubinstein, *Disallowed Deductions: 1969 Tax Reform Act Changes to Code Sec. 162*, 48 *Taxes* 457 (1970).

¹² Int. Rev. Code of 1954, § 162(a). Section 212 provides a similar deduction for ordinary and necessary expenses paid or incurred (1) for the production or collection of income; (2) for the management, conservation or maintenance of property held for the production of income; or (3) in connection with the determination, collection, or refund of any tax.

¹³ Int. Rev. Code of 1954, § 262.

¹⁴ Int. Rev. Code of 1954, § 161 provides, in part:

In computing taxable income . . . there shall be allowed as deductions the items specified in this part, *subject to the exceptions provided in part IX* (sec. 261 and following, relating to items not deductible) (emphasis added).

Section 211 establishes the same qualification for § 212 deduction of expenses incurred for the production of income.

¹⁵ See text at notes 40 and 41 *infra*.

¹⁶ For a discussion of both the policy and the corollary and their interpretation and application, see, e.g., *United States v. Gilmore*, 372 U.S. 39 (1963). Speaking for the majority, Justice Harlan noted that:

For income tax purposes Congress has seen fit to regard an individual as having two personalities: "one is [as] a seeker after profit who can deduct the expenses incurred in that search; the other is [as] a creature satisfying his needs as a human . . . but who cannot deduct such consumption and related expenditures." *Id.* at 44.

The Supreme Court has ignored net income policy only when the allowance of the deduction in question would frustrate sharply defined public policy. See *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958). But cf. Ellett and Rubinstein, note 11 *supra*.

A. *Direct Precedent: Henry C. Smith and Successors*

Prior to the initial granting in 1954 of a deduction for child care costs, such costs were classified as "personal" in *Henry C. Smith*.¹⁷ The petitioners in that case sought the deduction as a business/trade expense¹⁸ for the cost incurred in hiring nursemaids to care for their child, arguing that but for the nursemaid's services Mrs. Smith would have been unable to earn taxable income. The court upheld disallowance of the deduction by (1) classifying the expense as personal and therefore nondeductible pursuant to the predecessor¹⁹ of present section 262; and (2) rejecting it as a business expense on the ground that meeting the "but for" test was inadequate qualification for business expense status.

The *Smith* court's test for finding a personal expense looked to its essence: was the expense of a "personal . . . nature, of a character applicable to human beings generally, and which exist[s] on that plane regardless of the occupation . . . of the individuals concerned[?]"²⁰ The care of children, "like similar aspects of family and household life," was found to be personal under this test. The only ground on which costs for such care could qualify as a business expense, the fact that but for those costs the taxpayer could not have engaged in her trade, was decisively rejected.²¹ In subsequent cases classifying other types of expenses as business or personal, both the *Smith* court's test for a personal expense and its rejection of the "but for" test have been followed.²²

The *Smith* classification was not altered by introduction of the Section 214 deduction in the 1954 Code. In *Kenneth S. King*,²³ the taxpayer, a deserted husband, conceded that during the year for which he sought a deduction for the cost of nursing home care for his infant child, he had failed to meet the section 214 requirement that he be divorced from his wife. A deduction under that statute was therefore not available to him. He contended, however, that the sum was deductible as a business expense, since the expense had been a necessary prerequisite to his employment. The court rejected the contention, relying on *Smith*²⁴ to hold that the expense was not an ordinary and

¹⁷ *Henry C. Smith v. Commissioner*, 40 B.T.A. 1038 (1939), aff'd per curiam, 113 F.2d 114 (2d Cir. 1940).

¹⁸ The deduction was sought under Int. Rev. Code of 1939 § 23(a) (1), the predecessor to § 162 of the 1954 Code.

¹⁹ Int. Rev. Code of 1939, § 24(a) (1).

²⁰ 40 B.T.A. at 1039-40.

²¹ *Id.* at 1039.

²² See *Commissioner v. Moran*, 236 F.2d 595, 597 (8th Cir. 1956); *Simenstad v. United States*, 325 F. Supp. 1249, 1252 (N.D. Cal. 1971); *Fred W. Amend Co.*, 55 T.C. No. 31 (Nov. 19, 1970); *Richard Walter Drake*, 52 T.C. 842, 844 (1969) (all citing *Smith*).

²³ 19 CCH Tax Ct. Mem. 1519 (1960).

²⁴ The court also relied on *Mildred A. O'Connor*, 6 T.C. 323 (1946), the test case seeking deduction of child care costs under § 212. In that case the expense was found to be personal and thus disallowed in a holding relying upon *Smith*.

necessary business expense and that it was a personal expense explicitly not deductible under section 262.

Child care cases between *King* and the pending *Nammack* petition have not questioned the nature of the expense. The decisions have looked only to the terms of section 214, disallowing the deduction whenever those terms are not met, that is, whenever taxpayer's status varies from that prescribed by the statute.²⁵ Such decisions reflect unanimous classification of the child care expense as personal, hence deductible only to the extent allowed by legislative grace in section 214.

B. *Tests Used in Analogous Classification Cases:
Correlation with the Smith Test*

No test currently used in classifying other kinds of expenses as either business or personal would permit a categorization of child care costs different from that found in *Smith*. The current "origins" test used for litigation expenses²⁶ correlates with both *Smith* tests, by rejecting as a standard for business/trade status the income-producing or -diminishing outcome of the litigation. The "proximate relation or connection" standard, frequently used as a test for the business travel deduction under section 162(a)(2), also looks to the essential origin of the activity for which expenses were incurred. This test demands a distinctly business exigency requiring that activity.²⁷

Both the origins and the proximate relation tests permit deductibility of expenditures for items that may initially appear personal. For example, popular comments on the *Nammack* case find the business yacht less worthy of deductibility than the costs of child care.²⁸ The latter, however, originate in a personal/family need or relationship, the need of the child or aged parent for his parent's or relative's

²⁵ E.g., Alvin J. Linton, 30 CCH Tax Ct. Mem. 88 (1971) (deduction denied to husband still legally married to his wife at the end of the year); Betty C. Bosher, 30 CCH Tax Ct. Mem. 57 (1971) (deduction denied to working divorced mother because she had not shown that she was entitled to claim her three children as dependents).

²⁶ See *United States v. Gilmore*, 372 U.S. 39, 48-49 (1963); and *Woodward v. Commissioner*, 397 U.S. 572 (1970). In *Woodward*, the Court stated that:

A test based upon the taxpayer's "purpose" in undertaking . . . litigation would encourage resort to formalisms and artificial distinctions . . . Further, a standard based on the *origin* of the claim litigated comports with this Court's recent ruling . . . in *United States v. Gilmore*. . . The Court rejected a test that looked to the consequences of the litigation, and did not even consider the taxpayer's motives or purposes in undertaking defense . . . but rather examined the origin and character of the claim . . . and found that the claim arose out of the personal relationship of marriage (emphasis added).

Id. at 577-78. Cf. critical discussion of *Woodward* and the origins test in Gibbs, Legal Fees: Supreme Court Cases Requiring Capitalization Will Have Broad Impact, 33 J. Taxation 201 (1970).

²⁷ See, e.g., *Commissioner v. Flowers*, 326 U.S. 465, 470, 473-74 (1946) (applying the 1939 Code's predecessor of present § 162); *Williams v. Patterson*, 286 F.2d 333, 339-40 (5th Cir. 1961).

²⁸ See, e.g., *Boston Globe*, May 26, 1971, at 22, col. 1.

care; the cost of the yacht originates in a need of the business. Assuming that the taxpayer can show such an expenditure as ordinary and necessary in his business, it will be deductible under section 162 even though the yacht brings personal pleasure to the taxpayer's customers or corporate officers.²⁹ By the same tests, expenses incurred by the employer for meals and lodging provided to employees for the employer's convenience are of course deductible by the employer, since their origin lies in his business requirements, even though the food and shelter are then applied to the employee's personal needs.³⁰ On the other hand, such expenses as those incurred for "commuting, clothing, and a baby sitter for a working mother . . . [though] necessary to an individual's occupation . . ." are not deductible because they originate in personal need or choice.³¹

C. *Educational And Travel Expenses Deductible Under Section 162*

Certain costs are treated by tax law as business expenses despite their apparently personal nature; some educational costs and expenditures for food and lodging on business trips are the most familiar examples. Neither, however, provides an analogy adequate to justify reclassification of child care costs, since both have been distinguished from the profit-motivated but personal expenditures disallowed by section 262. Only those educational expenses incurred to meet the requirements of a present occupation were deductible under the 1939 and 1954 Codes.³² In 1967, new regulations disallowed even those expenses incurred to maintain or improve skills required by the individuals' current employment or trade, or to meet the express requirements of the employer, if at the same time the expenses served to provide primarily personal benefits to the taxpayer.³³ A recent Seventh

²⁹ See, e.g., *International Artists, Ltd.*, 55 T.C. No. 12 (Oct. 22, 1970), citing *Smith* in evaluation of the origin of the expenses incurred in constructing a home for Liberace.

³⁰ A series of motelkeepers' cases illustrates the distinction nicely. In *Commissioner v. Moran*, 236 F.2d 595, 597 (8th Cir. 1956), petitioners, partners whose hotel business required their constant presence, sought to deduct the living costs allocable to their having to stay at the hotel. The court admitted the trade/business connection of the costs but held that they were nonetheless personal in nature and therefore disallowed under § 262. Application of the "convenience of the employer" rule would classify the expenses as originating from the employer's business needs and not petitioners' personal needs; but since a partnership was not then recognized in tax law as an entity distinct from "partner-employees," the "convenience of the employer" rule was unavailable. In accord are *Commissioner v. Robinson*, 273 F.2d 503 (3d Cir. 1959) and *Commissioner v. Doak*, 234 F.2d 704 (4th Cir. 1956).

³¹ *Carroll v. Commissioner*, 418 F.2d 91, 95 (7th Cir. 1969).

³² An educational expense was first allowed as a business deduction in *Hill v. Commissioner*, 181 F.2d 906, 908 (4th Cir. 1950). The court there held the costs deductible after looking to their origin in a Virginia Code provision which required that the taxpayer undertake the education involved in order to renew the teaching certificate necessary to retain her job. *Treas. Reg. § 1.162-5* as adopted by T.D. 6291 (1958).

³³ *Treas. Reg. § 1.162-5*, as amended by T.D. 6918 (1967), disallows the deduction if the education involved is necessary to meet the minimum educational requirements

Circuit case noted that the disallowed expenses were analogous to the "necessary" but fundamentally personal costs of commuting or clothing.⁸⁴

The fact that costs of meals and lodging on business trips are deductible under section 162 would seem to be proof that essentially personal expenditures can be transformed into business expenses by establishing a profit motivation. Yet the administrative history of the meal and lodging deduction distinguishes it from other similar costs and justifies its escaping the prohibition of section 262. Originally, the deduction was granted only for the costs of meals and lodging incurred in excess of what the taxpayer would have had to pay at home. The cost of satisfying personal needs was not deductible; but a deduction was allowed for the additional expense originating from the business trip, that is, for the difference between the cost of meals on the road and that of meals at home.⁸⁵ Only the obvious administrative problems provoked by this rule prompted the current, more workable, regulation which allows deduction for all meals and lodging costs incurred on a business trip away from home.⁸⁶

A second requirement, the "duplicative rule," is an even clearer indication of the congressional intent to grant deduction for only those meals and lodging costs originating from the exigencies of the business trip. Taxpayers must maintain a permanent home or its equivalent in order to deduct for travel meals and lodging; otherwise such meals and lodging originate with personal needs for whose satisfaction the taxpayer has not otherwise provided.⁸⁷

D. *The Legislative History of Section 214*

The legislative history of section 214 apparently leaves no room for innovative court interpretation of child care costs as a business expense.⁸⁸ The single statement in the committee reports that could be

for qualification in taxpayer's employment, or if it will lead to qualifying him in a new trade or business. The costs incurred for such education are ruled to be either personal, or an inseparable aggregate of personal and capital, expenditures.

⁸⁴ *Carroll v. Commissioner*, 418 F.2d 91, 95 (7th Cir. 1969). For discussion of the new regulation see Comment, *The Deductibility of Educational Expenses: Administrative Construction of Statute*, 17 *Buff. L. Rev.* 182 (1967).

⁸⁵ *Rosenspan v. United States*, 316 F. Supp. 194, 197 (E.D.N.Y. 1970). See also *United States v. Correll*, 389 U.S. 299, 302-05 (1967), upholding the Commissioner's construal of "away from home" to exclude all trips except those requiring rest or sleep. The Court noted the significantly higher costs of such trips as a probable reason for congressional intention to allow such expenses as a "direct result of business travel" while disallowing commuting expenses. See also Annot., 19 L. Ed. 2d 1416 (1967).

⁸⁶ *Rosenspan v. United States*, 316 F. Supp. 194, 197 nn.3, 5 (E.D.N.Y. 1970) provides a convenient summary of the regulations involved.

⁸⁷ *United States v. Correll*, 389 U.S. 299, 305 n.18 (1967). For a concise summary of the development of the duplicative rule, see *Rosenspan v. United States*, 316 F. Supp. 194, 198 (E.D.N.Y. 1970).

⁸⁸ Cf. *Commissioner v. Bilder*, 369 U.S. 499, 504-05 (1962), ruling that since the legislative history revealed an unmistakable congressional purpose, and since the statute involved (§ 213) could reasonably be construed to reflect this legislative purpose, any other interpretation was foreclosed.

grounds for reclassification, "a widow or widower with young children must incur these expenses in order to earn a livelihood and . . . they, therefore, are comparable to an employee's business expenses,"³⁹ is silenced by the position of Section 214 in the Code, by the declared congressional policy behind it, and finally, by its own restrictive terms.

When the deduction was first granted in 1954, it was placed in Part VII of the Code as part of a series of apparently personal expenses made deductible as express exceptions to the prohibition of Section 262.⁴⁰ As exceptions to the rule, they represented "a policy judgment as to a particular class of expenditures otherwise nondeductible, like extraordinary medical expenses, . . . [but they did] not cast any doubt on the basic tax structure set up by Congress"⁴¹—that is, on such essential policies as the business/personal distinction.

The 1954 committee reports specify as the intended recipients of the deduction widows and widowers and "low income families, [wherein] the earnings of the mother are essential for the maintenance of minimum living standards, even when the father is also employed"⁴² The emphasis here, as in the reports on the 1963 and 1964 amendments, is on providing a limited amount of relief for the specified classes of persons.⁴³ Finally, the terms of the deduction as originally granted and as amended in 1963 and 1964⁴⁴ are so restrictive that it

³⁹ H. R. Rep. No. 1337, 83d Cong., 2d Sess. 30 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 36 (1954).

⁴⁰ Int. Rev. Code of 1954, ch. 1, pt. VII: §§ 213 (medical expenses), 214 (child-care), 215 (alimony), 216 (that portion of a cooperative housing corporation tenant-stockholder's payments that are allocable to taxes, interest, etc.), 217 (moving expenses). See § 262: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living or family expenses." See also Treas. Reg. § 1.262-1 (c) (1954) for a cross reference to the exceptional deductions.

⁴¹ *United States v. Gilmore*, 372 U.S. 39, 48 n.16 (1963), regarding the enactment of § 212(3) allowing deduction for expenses of contesting tax liability, apparently also applicable to the other deductions in this part of the Code.

⁴² S. Rep. No. 1622, 83d Cong., 2d Sess. 36 (1954).

⁴³ For example, the report accompanying the 1964 House proposal to raise the dollar limit to \$900 for two or more dependents argued that the raised deduction should not be made available to working couples but allowed only to single women or wives with incapacitated husbands. H.R. Rep. No. 749, 88th Cong., 2d Sess. (1964), U.S. Code Cong. & Ad. News 1366-67 (1964). The Senate's proposals were more liberal but stressed "carry[ing] out the original intention of Congress" by covering "the average case where the wife has found it necessary to supplement the husband's income by working" (emphasis added). S. Rep. No. 830, 88th Cong., 2d Sess. (1964), U.S. Code Cong. & Ad. News 1741 (1964). See also S. Rep. No. 69, 88th Cong., 1st Sess. (1963), U.S. Code Cong. & Ad. News 618-19 (1963).

⁴⁴ See *supra* note 2 for text of § 214. The 1963 amendment made the deduction available to a wife who has been deserted by her husband on the same basis as to a single woman, Pub. L. No. 88-4, § 1, 77 Stat. 4 (1963). In 1964 it was made available to husbands with incapacitated or institutionalized wives; the joint income limit for availability of the full deduction was raised from \$4500 to \$6000; the dollar limit was raised from a flat \$600 to \$600 for the care of one dependent and \$900 for care of more than one; and the age of a child for whose care the deduction could be taken was raised from under 12 to under 13 years of age. Pub. L. 88-272, tit. II, § 212(a), 78 Stat. 49 (1964).

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is impossible to argue that they were ever intended to cover the true costs of child care for any full-time worker lacking access to a subsidized day-care center, nursing home, or unusually inexpensive baby-sitters.⁴⁵

The congressional intention behind section 214, then, was to encourage employment among certain classes of taxpayers whose responsibility for children or older dependents would otherwise preclude their employment. It is possible—although the record is silent on this point—that a subordinate intention was to discourage single female beneficiaries from going on welfare and to encourage the wife of a low-income family to work rather than apply for aid after a real or fictitious separation from her husband.⁴⁶ In any case, the restrictive terms seem to indicate that the deduction was granted as a social welfare measure rather than as an economic-growth measure intended to stimulate employment among all classes of taxpayers.⁴⁷ Thus, the possibility of a judicial finding of legislative intent to treat child care costs as a business expense seems to be precluded.

II. THE CONSTITUTIONAL ARGUMENT

The constitutional arguments suggested by the *Nammack* and *Moritz* cases appear to offer little ground for judicial relief from the present restrictions of section 214. The courts have consistently held that classifications established by Congress under its plenary taxing power are constitutional, no matter how inequitable, so long as Congress treats alike an entire class of citizens.⁴⁸ The classic summary of this doctrine is found in *Brushaber v. Union Pacific*, where the majority stated that only if "the act complained of was so arbitrary as to constrain to the conclusion that it was not . . . taxation but a confiscation of property . . . or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent in-

⁴⁵ See text at notes 52 et seq. *infra*. The minority report recommended that the deduction be at least \$1200 per year, H.R. Rep. No. 1337, *supra* note 39, at B10.

⁴⁶ This conjecture is supported by the report accompanying the pending amendment to § 214, H.R. Rep. No. 231, 92d Cong., 1st Sess. 6 (1971):

The income tax changes included in this bill are closely associated with the social security and welfare provisions One of the income tax changes liberalizes the deduction for child care expenses where there is a working mother. This will be of primary benefit to those in the relatively low income levels and is in line with other provisions . . . which provide for child services and encourage those receiving welfare payments to obtain employment.

⁴⁷ Nowhere does the legislative history of § 214 reveal any notable interest in tax gains to be realized from higher employment encouraged by the statute. The strongest statement on that point was made in H.R. Rep. No. 231, *supra* note 46, at 237: "The annual revenue cost of these changes [liberalization of the child care deduction] is expected to be approximately \$75 million. This does not take into account any expansion in the work force stimulated by this credit."

⁴⁸ See, e.g., *Justice Douglas in United States v. Skelly Oil Co.*: "The search for equity in the tax laws is wondrous and elusive. As Edmond Cahn said: '[T]hose only are equal whom the law has elected to equalize.'" 394 U.S. 678, 687 (1969) (dissenting opinion).

equality as to inevitably lead to the same conclusion" could a tax classification be found so unreasonable as to constitute denial of due process.⁴⁹ Since section 214 operates against women only in the sense that it limits tax relief for a burden imposed on them not by law but by nature and/or culture—the personal care of dependents—it hardly falls within the *Brushaber* category as a denial of due process to women. Taxpayer Moritz might seem to have a stronger case, but a corollary to the *Brushaber* rule is that even an apparently arbitrary classification will not be disturbed if the congressional record shows a reasonable legislative intention.⁵⁰ The legislative history and terms of section 214 reveal a persistent attempt to help women primarily.⁵¹ The fact that the help provided to women is not more extensive while similar help is chivalrously denied to a certain class of males may be inequitable but not unconstitutional. The remedy for those protesting inequitable classification, the courts have ever pointed out, lies with Congress.

III. SECTION 214 AND THE PENDING AMENDMENT AS INSTRUMENTS OF POLICY

The policy that section 214 is intended to implement has been described above: the deduction was designed to enable certain women—and certain classes of men similarly situated—to work despite the responsibility for dependents requiring personal care.⁵² In essence, then, the deduction was intended as a subsidy to fill a particular need rather than as an instrument of general tax policy. A review of the legislative history reveals clearly that the child care deduction was designed as a subsidy.

In 1954 the House initially proposed allowing the deduction only for the care of children under ten, and making it available only to widows, widowers and women whose husbands are incapable of working and who "must incur" child care expenses "in order to earn a livelihood."⁵³ The foregoing language emphasizes necessity, not choice; earning a livelihood, not the right to work.⁵⁴ The Senate extended the

⁴⁹ *Brushaber v. Union Pacific R.R.* 240 U.S. 1, 24-25 (1916).

⁵⁰ See, e.g., *Johnston v. Commissioner*, 429 F.2d 804, 806-07 (6th Cir. 1970).

⁵¹ The Senate Committee's rejection of the Kerr-Smith amendment, which would have allowed the deduction to all taxpayers alike, including single men, was noted by the court in *Moritz*, 55 T.C. No. 14 (Oct. 22, 1970), citing Hearings on H.R. 8300 Before the Senate Comm. on Finance, 83d Cong., 2d Sess. 1798 (1954).

But see Petitioner's Brief at 41, where it is argued that § 214(b) discriminates against working women with children both in its demonstrated effects and in its underlying purpose. Petitioner contends that both its provisions and the legislative hearings and reports disclose in § 214 "a Congressional conviction that married women should remain at home and care for their children rather than pursue gainful employment, that the opportunity to work should be reserved to men unless it is absolutely necessary for the woman to work."

⁵² See text at notes 42-46 *supra*.

⁵³ H. R. Rep. No. 1337, *supra* note 39, at 30.

⁵⁴ Cf. Staff of the House Comm. on Ways and Means, 86th Cong., 1st Sess., Tax Revision Compendium [hereinafter cited as Tax Revision Compendium]. "The limited

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deduction to working wives of "low-income families, [where] the earnings of the mother are *essential* for the maintenance of *minimum* living standards. . . ."⁵⁵ The Kerr-Smith amendment, which would have extended the deduction to all taxpayers alike,⁵⁶ was rejected. When in 1963 and 1964 the statute was liberalized, both the limited nature of the changes⁵⁷ and the committee reports⁵⁸ reflected adherence to the original policy. Finally, only one term of the presently pending amendment, a sharp increase in the joint income ceiling, which would make the deduction available to working couples with joint incomes of \$12,000,⁵⁹ suggests even a modest modification of original congressional intent. The other terms of the proposal,⁶⁰ the language of the committee report,⁶¹ and the location of the amendment in a major piece of social security-welfare legislation are indications of a continuing legislative classification of the deduction as a social subsidy.

When section 214 was first enacted, the minority report noted that the amount of the benefit was "almost too small to be taken seriously."⁶² Neither the increases under the 1964 amendment nor those currently proposed in H.R. 1 go far to remedy the essential weakness of the statute as an instrument of policy. The facts of the *Nammack*⁶³ case, showing an average weekly expenditure of about \$55 rather than the \$11.54 that the statute allows as deductible, emphasize the judgment of the minority report that those who considered \$11.54 weekly an adequate deduction had "simply lost touch with realities."⁶⁴ The \$900 currently allowed for two or more dependents assumes weekly costs of about \$18, while the \$1500 deduction proposed in H.R. 1 for three or more dependents allows about \$29 a week; and those are the upper limits of deductible expenditure. For the care of only one dependent, H.R. 1 proposes a deduction of less than \$15 a week, notwithstanding the statement in the committee report which

scope of the expense allowances in the present law suggests that it represents a hardship subsidy rather than a concern for discrimination as such." *Id.* at 372 (paper submitted by White, Proper Income Tax Treatment of Deductions for Personal Expense).

⁵⁵ S. Rep. No. 1622, *supra* note 42, at 36 (emphasis added).

⁵⁶ See note 51 *supra*.

⁵⁷ The changes are summarized at note 44 *supra*.

⁵⁸ The reports are cited at note 43 *supra*. See especially the language of S. Rep. No. 830 quoted *supra* note 43; cf. S. Rep. No. 69, *supra* note 43, at 619, quoting a Treasury report in support of the 1963 extension of the deduction to deserted wives: "Since the child care deduction was originally authorized to alleviate the burdens on families where the mother *had to work in order to maintain minimum living standards* . . . it seems inequitable to deprive deserted wives of this form of assistance when they are in similar circumstances" (emphasis added).

⁵⁹ See text at notes 72-73 *infra*.

⁶⁰ See text at note 65 *infra*.

⁶¹ H.R. No. 231, at note 46 *supra*.

⁶² Minority report of H.R. Rep. No. 1337, *supra* note 39, at B10.

⁶³ See text *supra* at note 3. Mrs. Nammack claims a deduction of \$2860 for a year's expenses.

⁶⁴ Minority report of H.R. Rep. No. 1337, *supra* note 39, at B10.

recognizes the fact that "since 1954, the cost of child care has increased sharply."⁸⁵

Other terms of the statute place further limits on its usefulness. The low-income taxpayer for whose benefit it is intended must itemize deductions in order to claim the deduction; in all likelihood, he has insufficient itemized deductions of other kinds, or insufficient records, to make it worthwhile to utilize itemized deductions in lieu of the standard deduction.⁸⁶ Moreover, the actual dollar saving to the low-income taxpayer claiming this or any other personal deduction is minimal because the lower the marginal tax rate, the lower will be the tax saving. A table presented to the Senate in 1954⁸⁷ shows that the \$600 deduction would save an employee earning \$5000 only about \$126, while an employee with an income of \$10,000 would profit considerably more.

Arguably, however, these inadequacies are merely threshold problems. It could be claimed that the essential weakness of the deduction is that as part of tax law it cannot provide more than peripheral relief

⁸⁵ H. R. Rep. No. 231, supra note 46 at 236.

⁸⁶ Balch, in *Appraisal of Personal Deductions* (a paper submitted to the Tax Revision Compendium, supra note 54), summarizes the disadvantages suffered by "ordinary citizens" in taking itemized deductions and the consequently regressive distribution of the benefits of personal deductions. Tax Revision Compendium, supra note 54, at 435-36. Balch evaluates the child care deduction specifically: "Extremely few tax returns are able to claim this benefit, and most of these would pay no tax with or without the deduction. It is a very complicated section to apply, . . . and most taxpayers who meet the special tests imposed by this section do not itemize their deductions anyway." *Id.* at 438.

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TABLE 11.—*Comparison of the individual income tax liability for a widow with 1 child under present law and under H.R. 8300 assuming \$600 child care expenses and such person is head of a household.*

Net income (after deductions but before exemptions)	Tax liability		Reduction in tax under H.R. 8300 resulting from—		Total reduction	
	Present law	H.R. 8300 ¹	Child care provision	Head of household provision	Amount	Percent
\$1,500	\$60	—	\$60	—	\$60	100.0
\$2,000	160	\$40	120	—	120	75.0
\$3,000	360	240	120	—	120	33.3
\$4,000	568	440	126	\$2	128	22.5
\$5,000	778	640	126	12	138	17.7
\$8,000	1,508	1,284	156	68	224	14.9
\$10,000	2,060	1,732	180	148	328	15.9

¹ Assuming taxpayer itemizes deductions.

Hearings Before the Senate Comm. on Finance, 83d Cong., 2d Sess. 25 (1954).

to the social need involved. It might also be argued that the deduction may even obscure the need for positive action to resolve the dilemma of the individual who must work, but whose dependents need care that she, or he, cannot afford to pay others to provide.

The family assistance program in Title IV of H.R. 1 recognizes this dilemma by proposing free day-care centers for the children of a parent learning a skill.⁶⁸ Under this bill, once that parent is employed, she would have to pay for the care, but costs could be deducted from earnings which otherwise would be used to reduce family benefits.⁶⁹ As a result, her net income would be minimally affected so long as she remained in an income bracket qualifying her for family assistance. In comparison, the proposed amendment of Section 214 in Title V of H.R. 1 offers little dollar saving to taxpayers whose income is low, but above the family assistance level, and minimal help to those who cannot find extremely inexpensive care. It does offer a windfall to those single working women taxpayers with high incomes. Hence, both that proposal and the present statute represent tax expenditures that wastefully subsidize some who do not need the subsidy while failing to provide adequate help to many intended beneficiaries.⁷⁰ Both would appear to be ineffective instruments of the explicit policy behind section 214 and consequently of those general tax policies favoring full employment and economic growth.

One more anomaly is suggested by the pending amendment's proposal to raise from \$6000 to \$12,000 the joint income limit below which a working couple may take a full deduction.⁷¹ The committee report recognizes the latter figure as somewhat above the current median family income.⁷² This change suggests growing congressional recognition of the right of women *generally* to work, since, for the first time, a full deduction would be made available to a family with a relatively comfortable income. The anomaly arises from the still unrealistically low dollar limits on the amount of the deduction; unless the true cost of child care is deductible, such cost will remain an obstacle to most women's exercise of their right to work outside the home. Thus, the bill fails as much to implement any new intention to extend women's rights as it does to carry out the original policy.

IV. POSSIBLE ALTERNATIVES

One alternative to inadequacies in the present statute, a proposal based on the imputed income theory, was presented to Congress in 1959:

⁶⁸ H. R. Rep. No. 231, *supra* note 46, at 166-67.

⁶⁹ *Id.* at 167-68, 354.

⁷⁰ This supposition is supported by the fact, noted in S. Rep. No. 830, *supra* note 43, at 1741, that in 1960 only 244,000 returns claimed the deduction; 117,000 of these were joint returns. Cf. Balch, *supra* note 66. The thirteen bills filed in the 92d Congress to amend § 214 (see *supra* note 7) are indicative of widespread current dissatisfaction with the terms of the statute.

⁷¹ See note 8 *supra*.

⁷² H. R. Rep. No. 231, *supra* note 46, at 237.

The equity issue posed by child care expense . . . stems ultimately from a lack of imputation—in this case for the income in kind generated by personal services rendered within the home. Were the imputation made, then the tax differential would be reduced or eliminated from the choice confronting the mother as to whether to earn income by selling services outside the home or by performing services within. . . .⁷³

However, the practical difficulties of imputation, particularly those regarding evaluation of domestic services, would seem to limit its usefulness as a remedy for the deficiencies of section 214.⁷⁴

A more practical alternative is suggested by congressional treatment of the moving expense deduction, Section 217 of the Code.⁷⁵ Like section 214, 217 covers expenses inherently personal; like 214, it constitutes an exception to the general rule of section 262. The policy reasons behind it are the promotion of labor mobility and, hence, the reduction of local structural unemployment.⁷⁶ In 1969 Congress thoroughly liberalized the terms of the deduction, allowing all reasonable expenses of moving, plus up to \$1000 for indirect expenses such as househunting trips, to be deducted by all taxpayers moving to a new principal place of work.⁷⁷ The House report gave as reasons for the liberal allowance both the labor mobility policy and the fact that "[s]ubstantial moving expenses often are incurred by taxpayers in connection with employment-related moves. Moreover, in an important sense, these expenses may be viewed as a cost of earning income."⁷⁸

Through this legislation moving expenses were implicitly recognized as quasi-business expenses and thus accorded deductibility subject only to the requirement of reasonableness. The wording of the House report suggests a congressional determination that the amount of the expense incurred required treating it in this way if section 217 were to be an effective tool of policy. The personal nature of the expense is recognized in that it remains a Part VII deduction; but

⁷³ White in Tax Revision Compendium, *supra* note 54, at 371; see also Tax Revision Compendium at 403 (paper submitted by H. Kahn, Personal Deductions in the Individual Income Tax), for a discussion of imputation as a relief from the inequities of the present personal interest deduction. The imputation argument is developed with reference to the child care deduction in Note, Sex and the Single Man: Discrimination in the Dependent Care Deduction, 5 Valpariso L. Rev. 415, 437-38 (1971).

⁷⁴ White in Tax Revision Compendium, *supra* note 54, at 372, admits "the impracticability of imputation in this case."

⁷⁵ Int. Rev. Code of 1954, § 217.

⁷⁶ S. Rep. No. 830, *supra* note 43 at 1744; H. R. Rep. No. 91-413, 91st Cong., 1st Sess. (1969), U.S. Code Cong. & Ad. News 1721 (1969).

⁷⁷ Pub. L. 91-172, tit. II, § 231(a), 83 Stat. 577 (1969). The new place of employment must be at least 50 miles away from the old residence or place of work. Int. Rev. Code § 217(c) (1).

⁷⁸ H. R. Rep. No. 413, *supra* note 76, at 1721 (emphasis added).

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the terms are essentially those accorded business expenses. Moreover, the deduction is taken from gross income, precisely as in a business expense, so that the individual claiming it may take a standard deduction as well.⁷⁹

The child care expense is analogous to moving costs as an inherently personal expense whose "substantial" size would appear to require deductibility subject only to reasonableness, if congressional policy is to be carried out with even moderate effectiveness. Thus the case for amendment of section 214 in a manner similar to that of section 217 appears reasonable. If the congressional intention continues to be to provide relief primarily for taxpayers who must work in order to earn a livelihood, the deduction could be allowed only to those whose income is so low that employment is clearly a means of livelihood rather than a means of bringing home luxuries, or livelihood plus luxuries. Relief would be afforded, in other words, to persons whom Congress intends to subsidize. Should congressional concern for equality of the sexes so dictate, men in taxpayer Mortiz' class could also be included.

Such modification of the child care deduction would appear to provide a far more effective instrument of policy than either the current statute or the pending amendment, and would cause less squandering of tax expenditures in that only the intended beneficiaries of the subsidy could claim the deduction.⁸⁰ Admittedly, allowing the deduction on such terms would not reach the central problem, that of adequately meeting the day-care needs of the low-income, full-time worker. Still further liberalization of those terms, however, could provide meaningful dollar savings and simultaneously make the subsidy sufficiently visible to create a constant reminder of the need for more positive action. Such a liberalization would allow all reasonable costs of child care as a tax credit; or, alternatively, it could allow deduction of those costs from gross income, on exactly the same terms

⁷⁹ Int. Rev. Code of 1954, § 62(2) (8).

⁸⁰ Another advantage is essentially metaphysical. Conceptually, of course, child care expenses must always be personal in that they originate ab initio from a personal/family need. Nonetheless, Congress would eliminate much of the element of personal choice in the incurring of the expense by restricting the deduction to those whose income is so low that they virtually cannot choose to stay home to care for dependents if some alternative provision for that care is made. Compare the language of the Treasury Department recommending a limit of \$1500 on "indirect" moving expenses:

Direct expenses . . . would continue to be deductible without a dollar limitation.

The \$1,500 limitation on indirect expenses will provide the needed relief . . . for the great majority of employees; that is, employees with average earnings and average moving expenses. Total expenses for these indirect costs may exceed the limitation in cases of high-income employees. Their added costs are attributable to their higher standard of living which their increased earning power makes possible and should therefore properly be considered as personal rather than business related (emphasis added).

U.S. Treasury Department, Tax Reform Studies and Proposals, Joint Publication of House Comm. on Ways and Means and Senate Comm. on Finance, 91st Cong., 1st Sess., pt. 1, 216 (1969).

accorded a business or moving expense deduction, and so permit the taxpayer to take a standard deduction as well. Such a liberalization would of course increase tax expenditures. However, the legislative history of the statute emphasizes social need rather than limitation of tax expenditures, and insofar as the deduction could be made an effective policy instrument, its stimulation of employment could increase tax revenue.

CONCLUSION

Judicial relief for the inadequacies of the child care deduction statute does not appear to be available, either through reclassification of the expense as a business/trade expense or by a finding of a denial of due process. However, judicial focus upon inadequacies and inequities in tax law, and on the courts' inability to grant relief, has prompted legislative remedy in the past.⁸¹ The *Nammack* and *Moritz* cases provide an opportunity for such focus, particularly since Congress is now considering an amendment to section 214 that fails to correlate its terms with the announced policy behind the statute and with the general tax policy favoring full employment. Even though the courts cannot, in tax cases, do equity in the interstices of legislative grace, strong opinions and attendant publicity could serve as catalysts to effective congressional action.*

ANN FOX

⁸¹ E.g., *Lykes v. United States*, 343 U.S. 118 (1952) apparently helped to prompt enactment of § 212(3), Int. Rev. Code of 1954. *Higgins v. Commissioner*, 312 U.S. 212 (1941) was corrected by the Int. Rev. Code of 1939, § 23(a) (2), predecessor of § 212. See account of the decision and the congressional reaction in *Lykes v. United States*, 343 U.S. 118, 121 (1952).

* As this comment went to press in mid-November, the Senate Finance Committee reported out, as one of its amendments to H.R. 10947, the Revenue Act of 1971, an amended version of § 214. Entitled "Expenses for Household and Dependent Care Services Necessary for Gainful Employment," the amended section would allow a deduction of up to \$400 a month to an employed individual who maintains a household which includes at least one dependent child under fifteen or an incapacitated adult dependent. Expenses for household services unassociated with dependent care would be fully deductible, in contrast to the current regulation which disallows household expenses not allocable to such care. Treas. Reg. 1.214-1(f)(iii) (1956), amended by T.D. 6740 (1964), T.D. 6778 (1964), and T.D. 7114 (1971). Indeed, the taxpayer could deduct only \$200 for the care of one dependent *outside* the home, but he could then deduct the remaining \$200 for the services of a maid or cook within the home. A single taxpayer could take the full deduction regardless of his income; a working married couple would have to reduce their deduction by one dollar for every two dollars of joint income over \$12,000. S. Rep. No. 437, 92d Cong., 1st Sess. 59-62 (1971); Text of H.R. 10947 as Reported to the Senate on Nov. 9, 1971, Bill Section 210a.

Brief debate on the Senate floor led to the passage of two additional changes. The first, which would add a new paragraph (10) to Section 62 of the Code, would allow the deduction on the same terms as a business expense and so permit the taxpayer to take a standard deduction as well. 117 Cong. Rec. 18,396-398 (daily ed. Nov. 12, 1971). The second would allow the full deduction to working couples with a joint income of \$18,000; thus, income would have to be \$27,600 before all relief is phased out. 117 Cong. Rec. 18,550-555 (daily ed. Nov. 15, 1971).

Since the committee report and debates deserve evaluation more precise than can be

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made within the limits of an asterisk note, only two observations are submitted here. First, the report shows a legislative intent (1) to help "families with one working adult or families with two adults where the income level is such that both must obtain employment," and (2) to provide "employment opportunities for persons presently having difficulty in this respect." S. Rep. No. 437, 92d Cong., 1st Sess. 4, 60 (1971). The latter "persons," presumably, are those who will seek jobs as domestic workers rather than remain on welfare; the Finance Committee is offering jobs instead of dollar savings to those low-income persons for whom the enlarged deduction will provide almost no actual savings. It does so by offering large subsidies for maid service as well as dependent care to high-income single taxpayers and, after the floor amendment, to couples with joint incomes in the \$20,000 range. Even before the floor amendment was passed, the Treasury had estimated that the new deduction would result in tax expenditures—in the form of lost revenue—of \$21 million going to taxpayers with incomes of over \$20,000. S. Rep. No. 437, at 21. Indeed, Senator Long admitted in floor debate that the Committee had been surprised to find that the amendment would cost less than had been anticipated because "people at this income level [\$12,000] cannot afford to hire people at \$400 a month. . . . When you get up to about \$18,000, you are getting to people who can afford to fully use the \$400 deductions. . . ." It was after this debate that the Senate raised the beginning of phase-out to \$18,000. 117 Cong. Rec. 18,551 (daily ed. Nov. 15, 1971).

Thus, to accomplish its initial intent, the Senate is offering an amendment whose broad terms give maximum direct help, in the form of dollar savings, to high-income taxpayers. True, the amendment would allow lower-income families to take a more reasonable deduction than they now may, and a standard deduction as well; but, as Senator Long stated, low- and even middle-income families will not need a \$400 deduction. In opposition, representing the Treasury's point of view, Senator Bennett noted that people with incomes of over \$18,000 "probably already have their child care arranged. So, this is just a nice windfall for [them]. . . ." Id. at 18,554. Should that be true, fewer new domestic jobs than Senator Long anticipates will be created. Accordingly, it is submitted—assuming that such goals are to be pursued by tax rather than direct expenditures—that the Senators would have effected both of their initial intentions more efficiently, and with less waste of tax expenditures, by giving direct help in the form of a tax credit for child care expenses to low- and middle-income workers.

The second observation is prompted by the debates; they revealed senatorial acceptance of Mrs. Nammack's classification of child care costs as a business expense. On two NBC network television news programs in early November, she had argued that such costs were as fully business expenses as was David Rockefeller's expenditure for a secretary. The senators referred to her argument several times, with approval. Id. at 18,550-551. They did not question it on grounds of long-established tax policy denying deduction of even business-related personal expenses. Senator Long stated that "[w]hen you accept the logic of that argument [the analogy between a babysitter and a Rockefeller secretary], as the Senate has done," it "does not make much sense" to cut off the deduction at the \$12,000 level. Id. at 18,551. It is submitted, and the Senator came close to admitting, that by the foregoing logic it does not make much sense to cut off the deduction at *any* level. Rather, if the expenses are business costs, they should be deductible, subject only to reasonableness, by employed taxpayers of all income levels. Indeed, the household help costs not attributable to dependent care should be deductible by all workers, not just those whose homes "include" a child or incapacitated dependent. Finally, commuting, clothing and other employment-related though personal expenses deserve comparable treatment.

On December 4, in an action for which the report is not available as this note is written, the Conference Committee accepted the Senate amendment with two modifications. The first required that the deduction be itemized; that is, the taxpayer who would claim it must forego the standard deduction as he does under the current statute. The second applied the \$18,000 income limit, beyond which phase-out starts, to all taxpayers, not just to the working married couple.

The first modification implies rejection of the business characterization given to the deduction by the Senate floor amendment and so accords with traditional tax policy that

would classify the expense as personal. Its practical effect, however, is to deny the deduction to many lower-income taxpayers for whom the deduction is primarily intended, and hence to limit the creation of new jobs in those taxpayers' households. The second modification accords with classification of the deduction as a social welfare subsidy to taxpayers whose restricted incomes qualify them for special treatment. This change will reduce waste by denying the subsidy to single heads of households who have high incomes but who hitherto have qualified for the deduction because of their single status. On the other hand, this modification underlines the inefficiency that the first change would produce: that is, if the deduction is a subsidy rather than a business expense to which all are entitled, why deny it, by requiring itemization, to many of the low-income taxpayers most in need of that subsidy?

Statistics estimating the effect of the deduction as it emerged from Conference Committee projected a total tax expenditure of \$145 million in 1972, of which \$64 million represents loss of revenue from taxpayers with individual incomes over \$15,000. See Conference changes tabulated in 117 Cong. Rec. 12,120, Table 3 (daily ed. Dec. 9, 1971). Returns showing incomes over \$15,000 formed about 8.8% of total taxable and nontaxable returns submitted in 1968. Internal Revenue Service, *Statistics of Income 1968, Individual Income Tax Returns 7*, Table 1.2 (1970). Accordingly, the deduction, as reported out of Conference Committee, would give about 44% of the tax expenditure of \$145 million to less than 9% of the nation's taxpayers. It is submitted that the inefficiency and inequity suggested by this statistic, and by the criticisms given above, are inherent in congressional attempts to use tax law to pursue goals that may be better achieved by direct legislation.