EMPLOYED ARTISTS' HOME OFFICE DEDUCTIONS IN THE AFTERMATH OF *WEISSMAN v. COMMISSIONER*: THE SECOND CIRCUIT'S NEW LIMITED EXCEPTION FOR TAXPAYER-EMPLOYEES

I. INTRODUCTION

The Court of Appeals for the Second Circuit has twice recently upheld a taxpayer-employee's use of a home office as his principal place of business, even though the employee had also performed substantial work at the employer's premises. These decisions enabled taxpayers to qualify for a home office deduction under the principal place of business exception of Internal Revenue Code section 280A.[1]

In *Drucker v. Commissioner*,[2] concert musicians successfully argued that their home studios used for individual practice became their principal place of business, when their employer failed to provide them with *any* space for individual practice at the concert hall. Similarly, in *Weissman v. Commissioner*,[3] a university professor successfully argued that two rooms in his apartment used for research and writing made that location his principal place of business when his employer failed to provide him with *suitable* space at the university. The significance of these decisions is twofold: (1) each reversed the Tax Court's application of its objective and uniform standard[4] used in ascertaining the location of a taxpayer's principal place of business; and (2) both provide a definitive and workable standard to be used in determining whether the taxpayer-employee satisfied the I.R.C. section 280A(c) requirement that his exclusive use of a home office be for the convenience of the employer.[5]

This Note examines *Drucker* and *Weissman* in light of prior case law and the legislative history of I.R.C. section 280A. The purpose of this Note is to determine the effect of the Second Circuit's decisions on the Tax Court's analytical calculation in locat-

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[1] Tax Reform Act of 1976, Pub. L. No. 94-455, § 601, 90 Stat. 1520, 1569-72 (1976), *as amended by*, The Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 113(c), 95 Stat. 1642 (1981) (codified at 26 U.S.C. § 280A(c)(1)(A) (1982)) [hereinafter cited as I.R.C.].

[2] 79 T.C. 605 (1982), *rev'd*, 715 F.2d 67 (2d Cir. 1983); *see also infra* note 110.

[3] 47 T.C.M. (CCH) 520 (1983), *rev'd*, 751 F.2d 512 (2d Cir. 1984).

[4] *See infra* notes 16-23 and accompanying text.

[5] *See infra* notes 189-219 and accompanying text.

ing a taxpayer-employee's principal place of business, with particular emphasis on employed artists who work at home. This Note concludes that: (1) the Second Circuit has created a limited exception to the general rule that an employee's principal place of business is at his employer's business location; and (2) the employee will have to demonstrate an absolute need for a home office before the exception may be invoked. Finally, this Note posits hypothetical cases involving artist-employees and diagrams potential problems with the Second Circuit's limited exception.

II. I.R.C. SECTION 280A(C)(1)(A): SUMMARY

A. *Legislative Concerns*

Since its enactment in 1976,[6] the home office deduction of I.R.C. section 280A has been the subject of much litigation and commentary.[7] Although I.R.C. section 280A generally prohibits a taxpayer from taking a home office deduction,[8] it does provide

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[6] I.R.C. § 280A; *see supra* note 1.

[7] The statutory treatment and case history of home office deductions has already been fully explored by other commentators. Therefore, this Note will briefly summarize these areas. For further discussions on the topic of home office deductions under I.R.C. § 280A, see generally Comment, *Putting the House in Order: An Analysis of and Planning Considerations for Home Office Deduction*, 14 U. BALT. L. REV. 522 (1985); Note, *Sweet Music to Taxpayers' Ears: Section 280A and The Home Office Deduction After Drucker v. Commissioner And The New Proposed Regulations*, 4 VA. TAX. REV. 163 (1984); Mulligan, *The Tax Ramification Of The Business Use Of a Home*, 8 OKLA. CITY U. L. REV. 201 (1983), *reprinted in* 58 FLA. B.J. 349 (1984), *reprinted in* 55 PA. B.A.Q. 105 (1984); Davis & Heller, *An Update on Sec. 280A: Home Office and Vacation Home Deductions (part 1)*, 14 TAX ADVISER 525 (1983); Note, *The Deductibility of Home Office Expenses Under Section 280A: Personal Convenience vs. Business Necessity*, 36 TAX. LAW. 1199 (1983); Eichenbaum, *The Office At Home*, 10 J. REAL EST. TAX'N 63 (1982); Ward, *Home Office Deductions: The Development and Current Status of Section 280A(c)(1)*, 13 CUM. L. REV. 195 (1982); Kulsrud, *Recent Statutory and Judicial Developments Have Liberalized Home-Office Deductions*, 56 J. TAX'N 344 (1982); Note, *Home Office Deductions: May a Taxpayer Have More Than One Principal Place of Business?*, 79 MICH. L. REV. 1607 (1981); Lang, *When a House is Not Entirely a Home: Deductions Under Internal Revenue Code § 280A for Home Offices, Vacation Homes, Etc.*, 1981 UTAH L. REV. 275; Note, *Home Office Deductions: Curphey v. Commissioner, 73 T.C. 766 (1980)*, 60 NEB. L. REV. 619 (1981); Kulsrud, *Home Office Expenses: Recent Developments May Hold Key to Deduction*, 59 TAXES 587 (1981); Everett, *Home Office Expense Deductions: More Trouble Than They Are Worth?*, 58 TAXES 589 (1980); Green, *The Home Office Deduction and the Two-Business Taxpayer*, 4 REV. TAX INDIV. 366 (1980); De Guardiola, *Home Office Deductions Under the New Section 280A of the Internal Revenue Code*, 6 FLA. ST. U.L. REV. 129 (1978); Comment, *Commingling Business and Personal Use of Real Property: Severe Restrictions Under The 1976 Tax Reform Act*, 13 GONZ. L. REV. 493 (1978); Smith, *'76 Act Locks the Door on Many Office-In-Home Deductions*, 8 TAX ADVISER 354 (1977); Blackburn, *The Office at Home: What It Was, What It Is, What It Might Become*, 6 J. L. & EDUC. 229 (1977); Pearle, *Practioners Guide To Home Office Deductions Under Tough TRA 1976 Rules*, 46 J. TAX'N 238 (1977); Rose, *Home Office Deductions Under the Tax Reform Act of 1976*, 63 A.B.A. J. 559 (1977); Curatola, Dascher & Nickerson, *Home, Sweet (or Sour?) Home*, 55 TAXES 734 (1977); Jensen, *The Home Office Deduction in the Aftermath of Bodzin*, 54 TAXES 771 (1976); Harmelink and Shurtz, *Deductions for Home Office: Current Proposals and Recommendations*, 54 TAXES 517 (1976).

[8] I.R.C. § 280A(a) provides:

for specific exceptions[9] which, if met, will enable a taxpayer to deduct the business costs of maintaining a home office. Much of the litigation and commentary has involved the principal place of business exception.[10] This exception is invoked when the taxpayer (1) works at more than one location for the business in which he is engaged, (2) uses a portion of his home as an office in the business endeavor, and (3) claims that the home office is his

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(a) General rule

[I]n 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.

[9] The exceptions to I.R.C. § 280A(a) are found under I.R.C. § 280A(c) which, in pertinent part, provides:

(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) the principal place of business for any trade or business of the taxpayer.

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer.

. . . .

(5) Limitation on deductions

In the case of a use described in paragraph (1) . . . the deductions allowed under this chapter for the taxable year by reason of being attributed to such use shall not exceed the excess of—

(A) the gross income derived from such use for the taxable year, over

(B) 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.

The exclusive and regular use requirements of I.R.C. § 280A(c) will be discussed in part VI. *See infra* notes 221-24 and accompanying text. The limitation on the deduction requirement will also be discussed in part VI. *See also infra* note 229 and accompanying text.

[10] Comment, *Putting the House in Order: An Analysis of and Planning Considerations for Home Office Deduction*, 14 U. BALT. L. REV. 522, 531-38 (1985) [hereinafter cited as Comment, *Putting the House in Order*]; Note, *Sweet Music to Taxpayers' Ears: Section 280A and The Home Office Deduction After Drucker v. Commissioner And The New Proposed Regulations*, 4 VA. TAX REV. 163, 170-74 (1984) [hereinafter cited as Note, *Sweet Music to Taxpayers' Ears*]; Davis & Heller, *An Update on Sec. 280A: Home Office and Vacation Home Deductions (part 1)*, 14 TAX ADVISER 525, 526-30 (1983); Note, *The Deductibility of Home Office Expenses Under Section 280A: Personal Convenience vs. Business Necessity*, 36 TAX LAW. 1199, 1207-20 (1983) [hereinafter cited as Note, *The Deductibility of Home Office Expenses*]; Eichenbaum, *The Office At Home*, 10 J. REAL EST. TAX'N 63, 68-72 (1982); Ward, *Home Office Deductions: The Development and Current Status of Section 280A(c)(1)*, 13 CUM. L. REV. 195, 205-09 (1982) [hereinafter cited as Ward, *Home Office Deductions*], Kulsrud, *Recent Statutory and Judicial Developments Have Liberalized Home-Office Deductions*, 56 J. TAX'N 344-48 (1982) [hereinafter cited as Kulsrud, *Recent Statutory and Judicial Developments*]; Kulsrud, *Home Office Expenses: Recent Developments May Hold Key To Deduction*, 59 TAXES 587, 591-95 (1981) [hereinafter cited as Kulsrud, *Home Office Expenses*].

principal place of business.[11]

Although Congress did not define the phrase "principal place of business," the thrust of the legislative history indicates that Congress sought to provide objective standards by which taxpayers would qualify for home office deductions.[12] Congress was specifically concerned with taxpayer abuse of converting nondeductible personal living expenses "into deductible business expenses simply because, under the facts of the particular case, it was appropriate and helpful to perform some portion of the taxpayer's business in his personal residence."[13] The Tax Court, under the general I.R.C. provisions for business[14] and production of income[15] expense deductions, had employed an "appropriate and helpful" standard[16] in discerning when use of a

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[11] *See infra* notes 31-83.

[12] *See* S. REP. No. 938, 94th Cong., 2d Sess. 144, 147, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3439, 3576, 3579 [hereinafter cited as S. REP. No. 938]; H.R. REP. No. 658, 94th Cong., 2d Sess. 157, 160, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2897, 3050, 3053 [hereinafter cited as H.R. REP. No. 658]; JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, 94th Cong., 2d Sess. 136, 139, *reprinted in* 1976-3 C.B. (vol. 2) 1, 148, 151.

[13] S. REP. No. 938, *supra* note 12, at 147; H.R. REP. No. 658, *supra* note 12, at 160.

[14] I.R.C. § 162, in pertinent part, provides:

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

[15] I.R.C. § 212 provides:

> In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—
> (1) for the production or collection or 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.

[16] Welch v. Helvering, 290 U.S. 111, 113 (1933). Justice Cardozo defined "necessary" business expenses as those made by a taxpayer that were "appropriate and helpful" for the development of the taxpayer's business. *Id.* In addition, Justice Cardozo stated that "ordinary" business expenses were those that were commonly made in the business. *Id.* at 114. In Commissioner v. Tellier, 383 U.S. 687 (1966), Justice Stewart clarified the definition of "ordinary" business expenses. He stated that "[t]he principal function of the term 'ordinary' in [I.R.C.] § 162(a) [was] to clarify the distinction, often difficult, between those expenses that [were] currently deductible and those that [were] in the nature of capital expenditures, which, if deductible at all, [had to] be amortized over the useful life of the asset." *Id.* at 698-90 (citation omitted).

Although the concepts of what constituted ordinary and necessary business expenses were separate, the Tax Court merged the two tests into a singular concept for home office deductions for employees. Newi v. Commissioner, 28 T.C.M. (CCH) 686, 691 (1969), *aff'd*, 432 F.2d 998 (2d Cir. 1970); Bodzin v. Commissioner, 60 T.C. 820, 825-26 (1973), *rev'd on other grounds*, 509 F.2d 679 (4th Cir.), *cert. denied*, 423 U.S. 825 (1975); *see also* Ward, *Home Office Deductions*, *supra* note 10, at 197-202; Note, *Home Office Deductions: Curphey v. Commissioner, 73 T.C. 766 (1980)*, 60 NEB. L. REV. 619, 624-27 (1981); De Guardiola, *Home Office Deductions Under the New Section 280A of the Internal Revenue Code*, 6 FLA. ST. U.L. REV. 129, 132-35 (1978); *see generally* Comment, *The Home Office Deduction: Another Tax Loophole?*, 11 IDAHO L. REV. 193, 199-202 (1974); Comment, *Ste-*

home office was "ordinary and necessary" within the meaning of these provisions.[17] Unless it was clear from the facts of a particular case that the taxpayer's use of a home office was only for his personal convenience,[18] the taxpayer would ordinarily get a home office deduction.[19] In addition, the Tax Court's appropriate and helpful standard was inherently difficult for the Internal Revenue Service to apply to all taxpayers on a case-by-case basis, since it depended on the taxpayer's subjective circumstances.[20] Consequently, the appropriate and helpful standard provided no certain rules for taxpayers wishing to know when and under what circumstances they could deduct home office expenses.[21]

For these reasons, Congress enacted I.R.C. section 280A to remove home office deductions from the realm of the general business and production of income expense deductions.[22] In effect, Congress thoroughly repudiated the appropriate and helpful standard and demanded stricter controls for use in determining whan a taxpayer may qualify for a home office expense deduction.[23]

B. *The Tax Court's Response: The Focal Point Standard*

The Tax Court was cognizant of the congressional intent to make the inquiry objective under which it was to permit a home office deduction.[24] In the circumstance of a taxpayer working solely out of a home office, the Tax Court could readily find the home office to be the taxpayer's principal place of business. For example, in *Gomez v. Commissioner*,[25] the taxpayer was employed as a sales account manager for a corporation. The taxpayer sold

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phen A. Bodzin and George W. Gino: Liberalization of the Employee's Home Office Deduction, 59 IOWA L. REV. 1324 (1974); Comment, *Taxation:—The Office-in-Home Deduction*, 74 W. VA. L. REV. 423 (1972).

17 *See supra* notes 14-15.

18 *See* Sharon v. Commissioner, 66 T.C. 515, 524 (1976), *aff'd per curiam*, 591 F.2d 1273, 1274 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979); Monsky v. Commissioner, 36 T.C.M. (CCH) 1046, 1049 (1977); Salviati v. Commissioner, 36 T.C.M. (CCH) 1041, 1043 (1977); Bodzin v. Commissioner, 509 F.2d 679, 681 (4th Cir. 1975).

19 *See, e.g.*, Anderson v. Commissioner, 33 T.C.M. (CCH) 234, *aff'd in relevant part*, 527 F.2d 198 (9th Cir. 1975); Johnson v. Commissioner, 31 T.C.M. (CCH) 941 (1972); Rafferty v. Commissioner, 30 T.C.M. (CCH) 848 (1971); *see also* Bischoff v. Commissioner, 25 T.C.M. (CCH) 538 (1966); Peiss v. Commissioner, 40 T.C. 78 (1963).

20 S. REP. No. 938, *supra* note 12, at 147; H.R. REP. No. 658, *supra* note 12, at 160.

21 S. REP. No. 938, *supra* note 12, at 147; H.R. REP. No. 658, *supra* note 12, at 160.

22 S. REP. No. 938, *supra* note 12, at 147, 148; H.R. REP. No. 658, *supra* note 12, at 160.

23 *See* S. REP. No. 938, *supra* note 12, at 147, 148; H.R. REP. No. 658, *supra* note 12, at 161.

24 *See* Curphey v. Commissioner, 73 T.C. 766, 769-76 (1980).

25 41 T.C.M. (CCH) 585 (1980).

"merchandise to, and serviced existing accounts of,"[26] her employer's customers in order to discharge her employment requirements. However, the corporation did not provide the taxpayer with an office.[27] The taxpayer worked out of a portion of her home which she claimed to be her principal place of business,[28] because it was the only site of her business activity. The Internal Revenue Service conceded the issue in this situation.[29]

However, when a taxpayer worked at more than one location, including his home office, the Tax Court had to devise some test by which it could reasonably calculate the location of the taxpayer's principal place of business. Moreover, that test had to effectuate the intent of Congress. The Tax Court devised such a test in *Baie v. Commissioner*.[30]

In *Baie*, the taxpayer was a self-employed proprietress of a hot dog concession.[31] The concession stand had limited space and had no room for an office. Therefore, the taxpayer used portions of her home to prepare additional food and to attend to her business "records or other paperwork."[32] The taxpayer claimed that the portion of her home used in connection with her business was her principal place of business for purposes of qualifying for a home office deduction.

The Tax Court held that the hot dog stand itself was the taxpayer's principal place of business, because the concession was the location where the "focal point" of her activities occurred.[33] The court's determination of the actual focal point was interpreted in light of Congress' intentional use of "principal place" in the statute.[34] The court further noted that "principal" was defined as meaning "most important . . . primary . . . [h]ighest in rank, authority, character, importance or degree."[35] Therefore, the focal point of a taxpayer's business activities would be the location of the primary or most significant business activity given the purpose for which the taxpayer was in business.[36] Once the focal point of a taxpayer's activities was determined, that location would be the taxpayer's principal place of business.

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[26] *Id.* at 586.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] 74 T.C. 105 (1980).
[31] *Id.* at 106.
[32] *Id.*
[33] *Id.* at 109.
[34] *See id.* at 109.
[35] *Id.* at 109 n.5 (quoting BLACK'S LAW DICTIONARY 1355 (4th ed. 1951)).
[36] *See id.* at 109.

Under the focal point analysis,[37] the Tax Court determined that the purpose for which Baie was in business was to sell food.[38] Next, the court identified the most significant business activity, given her business purpose, by comparing Baie's home activities of preparing food and bookkeeping with her concession activities of packaging and selling the food.[39] The court concluded that the packaging and selling of the food was Baie's primary business activity. Although the court acknowledged the necessity of Baie's partial use of her home for business,[40] the court found that the home activities were secondary to her concession activities.[41] Therefore, the court denied Baie's claim for a deduction.

To support its conclusion, the Tax Court further found that it was "[t]he sales of [Baie's] fast food [that] generated her income,"[42] implying that the location where Baie earned her income had been a factor in its focal point analysis. However, the Tax Court went on to state that "[e]ven though preliminary preparation may have been beneficial to the efficient operation of [Baie's] business, both the final packaging for consumption and sales occurred on the premises of the [concession]."[43] Thus, the location where the taxpayer earned her income was not the dispositive factor; the Tax Court's own language here makes clear that its focal point analysis was predicated upon a comparison of Baie's various business activities to determine which was her primary activity given the purpose for which she was in business.

Commentators, however, have criticized the Tax Court's focal point standard, as enunciated in *Baie*, as a mere source of income test.[44] They argue that activities that are substantially related to the income producing process are ignored, because such activities are carried on at the home office rather than the

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37 The terms "analysis," "test," and "standard," when used in conjunction with "focal point," are hereinafter used as interchangeable terms. The author also uses "test" and "standard" as interchangeable concepts.

38 *See* 94 T.C. at 109-10.

39 *Id.* at 109-10.

40 *Id.* at 107.

41 *See id.* at 109.

42 *Id.* at 109.

43 *Id.* at 109-10.

44 Note, *Sweet Music To Taxpayers' Ears*, *supra* note 10, at 172-74; Note, *The Deductibility of Home Office Expenses*, *supra* note 10, at 1207, 1210-12; Ward, *Home Office Deductions*, *supra* note 10, at 207; Kulsrud, *Recent Statutory and Judicial Developments*, *supra* note 10, at 346-47; Kulsrud, *Home Office Expenses*, *supra* note 10, at 593-95; *see also* Comment, *Putting the House in Order*, *supra* note 10, at 532.

place of employment.[45] This view is predicated upon a series of post-*Baie* cases which deal with taxpayer-employees. To support their argument, the commentators cite the Tax Court's own language which, in effect, states that since the taxpayer earned his income at his place of business or at his employer's premises, that location was construed to be the taxpayer's principal place of business.[46]

For example, in *Chauls v. Commissioner*,[47] the taxpayer was employed as a music instructor at a college. The requirements of the taxpayer's position were that he teach classes in music theory, music appreciation, and musicianship.[48] Additionally, the taxpayer taught classes in piano, assisted in producing the college's opera, and conducted the school's choir.[49] To assist the taxpayer in carrying out his duties, the college provided him with an office, which he shared with two other faculty members, classrooms containing pianos, and a rehearsal room.[50]

Chauls, however, maintained an office in his home to grade papers, prepare class work, and plan rehearsals and concerts.[51] Chauls also had converted his den into a music room where he could practice the piano in connection with recitals that he was expected to give as a music instructor at the college.[52] Chauls claimed a home office deduction for the business use of his home.

The Tax Court, however, found that Chauls was employed to teach classes at the college and was provided with space to carry out his job requirements.[53] Citing *Baie*, the court found the focal point of Chauls' activities to be in his classroom since "it was [his] teaching of classes that generated his income and, even though some or even most of his preparation for those classes was done in his home, his principal place of business was at the

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45 Kulsrud, *Recent Statutory and Judicial Developments*, *supra* note 10, at 347; Kulsrud, *Home Office Expenses*, *supra* note 10, at 593-95.

46 Kulsrud, *Recent Statutory and Judicial Developments*, *supra* note 10, at 347.

47 41 T.C.M. (CCH) 234 (1980).

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 235.

52 *Id.*

53 *Id.* at 236. The Tax Court also found that Chauls carried on personal and business activities in his home office by preparing his "Federal [sic] income tax returns, sorting his mail, paying his personal bills and doing work in connection with his investments . . . ." *Id.* at 235. Similarly, Chauls' music practice room opened into the living room and was used by Chauls when he gave parties. *Id.* Thus, even before the Tax Court could have decided the issue of where Chauls' principal place of business was, it could have held that Chauls violated the exclusive use requirement for home office use. *See id.*; *see also infra* notes 221-22 and accompanying text.

school where he taught."[54] The court's language here lends support to the commentators' criticism.

The commentators' argument was further strengthened when the Tax Court, in *Aab v. Commissioner*,[55] again used language suggesting that the focal point standard would turn on the location where the taxpayer earned her income. Aab was a licensed physician who was employed as a research associate to conduct cancer research at an institute.[56] Aab also was required to write articles for publication based on her research and write grant proposals.[57] Although all research was carried on at the institute, Aab had no desk within the laboratory upon which to write.[58] Since Aab was not provided with a separate office at the institute,[59] she used a room in her home to write.[60]

In denying Aab a home office deduction for the business use of her home, the Tax Court held that Aab's laboratory was her principal place of business under the focal point standard.[61] Citing *Baie*, the Tax Court found that:

> [a]lthough the use of her "home office" was necessary to carry out an integral part of [her] job, it was nonetheless incidental to the fundamental research carried on at the laboratory. In short, [Aab] was paid to do research. As a researcher, the laboratory was the "focal point" of [her] business.[62]

This language seems to support the commentators' position that the focal point standard was a mere source of income test.

Notwithstanding the Tax Court's language, all of Aab's activities generated her income; she was an employee who was paid a sal-

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[54] 41 T.C.M. (CCH) at 236. The Tax Court rejected the proposition that the number of hours spent at the home office compared to the number of hours spent at the business premises was the proper criterion for determining the location of the principal place of business. *Id.* Perhaps a determination predominantly based on the amount of time a taxpayer worked at his office would afford the taxpayer the opportunity to decide when a home office was his principal place of business. However, the Internal Revenue Service's proposed method of determining a taxpayer's principal place of business includes a consideration of "[t]he amount of time spent in business activities in each location . . . ." 45 Fed. Reg. 52,399, 52,403 (1980) (to be codified at 26 C.F.R. § 1.280A(a)(2)) (proposed August 7, 1980).

[55] 42 T.C.M. (CCH) 1519 (1981).

[56] *Id.*

[57] *Id.* at 1520.

[58] Aab was able to use whatever counterspace she could find in the laboratory to write. *Id.*

[59] *Id.*

[60] Aab "also used the 'home office' to prepare for committee meetings, to review grant proposals made by other doctors, and to prepare lectures." *Id.*

[61] *Id.* at 1521.

[62] *Id.* The court noted the importance of Aab's writing and her need to use the home office for business purposes.

ary.[63] Each activity was a condition of her employment and was compensable as a part of her salary.[64] Thus, the Tax Court's use of the focal point standard demonstrates a more sophisticated approach than the one the commentators have suggested. The Tax Court compares each activity to determine which is the primary activity.[65] Aab's research was carried on regularly[66] and provided her with the subject matter for her articles. In short, research was central to Aab's other business activities. In following *Baie*, the Tax Court makes the same inquiry in order to ascertain the taxpayer's principal place of business.[67] The focal point standard, then, is used to locate the primary business activity of the taxpayer, and it is not dependent upon an illusory determination of where the taxpayer's income is generated.

In contrast, the taxpayer in *Green v. Commissioner*[68] was employed as a real estate developer. Green was responsible for the administrative and physical management of seven condominiums.[69] Green was provided with an office at the premises of his corporate employer.[70] At that office, Green carried on the paperwork associated with managing the condominiums and had a secretary who took messages for him when he was away from the office.[71] Green's duties required him to be at the various condominiums eighty percent of each working day, so he was often away from his employer-provided office.[72] Green's employer required him to be available in the evenings at home to receive calls from clients who could not contact Green during the regular business day.[73] To comply with this job requirement, Green maintained an office in his home.[74] Although Green spent about an equal amount of time in his home office as he did in his employer-provided office, he claimed that his home office was his principal place of business.

The Tax Court scrutinized Green's various business activities

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63 *See id.* at 1519-20.

64 *See id.*

65 *See supra* text accompanying notes 33-43.

66 Aab worked regularly at the institute's laboratory for over four hours per day. 42 T.C.M. (CCH) at 1520.

67 *See supra* text and accompanying notes 33-43; *see also* Jackson v. Commissioner, 76 T.C. 696, 700 (1981).

68 78 T.C. 428 (1982), *rev'd in part*, 707 F.2d 404 (9th Cir. 1983).

69 78 T.C. at 429.

70 *Id.*

71 *Id.* at 429-30.

72 *Id.* at 430.

73 *Id.*

74 The Tax Court also noted that Green only used the telephone in his home office for the management of the condominiums. He did not perform any routine paperwork associated with his management activities in the home office, even though he kept business records there. *Id.*

under the focal point standard and concluded that Green's home office was not his principal place of business. Instead, the Tax Court found that the employer-provided office was the focal point of Green's activities;[75] it was in that office where Green did his requisite paperwork and supervised a secretary.[76] In addition, the court stated that "the number of hours of use alone does not necessarily determine whether an office qualifies as the taxpayer's principal place of business."[77]

Green spent most of his employment-related time in the field,[78] and it can be inferred that most of his actual management activities occurred there as well.[79] Therefore, neither the home office nor the employer-provided office should have been Green's principal place of business under the focal point standard.[80]

However, it is implicit in the Tax Court's analysis that if the employee has an employer-provided office, that location will most likely be the employee's principal place of business, because some significant business activities occur therein. Moreover, the Tax Court's analysis in *Green* is consistent with its prior decisions under the focal point standard. Although the court found Green's home office activity important, it was not as significant as his other business activities which were carried on at the employer-provided of-

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[75] *Id.* at 433.

[76] *Id.*

[77] *Id.* Green was only present in his employer-provided office for 20% of the working day. *Id.* at 429.

[78] *Id.* at 430.

[79] *See id.* at 429-30.

[80] *Cf.* Cristo v. Commissioner, 44 T.C.M. (CCH) 1057 (1982). The taxpayers in *Cristo* bought and renovated an apartment house for the purpose of converting it into eight apartments to be used for rental purposes. *Id.* at 1058. Since there was no space available at the apartment house for an office in which the taxpayers could keep tenant leases, tenant files, and tax records, the Cristos maintained an office in their home. In addition, the Cristos used their home office to interview prospective tenants and receive tenant complaints. *Id.* at 1064.

The Tax Court denied the Cristos a home office deduction under both I.R.C. §§ 280A(c)(1)(A) and (B). In discussing § 280A(c)(1)(A), the court followed *Baie* in employing the focal point standard. *Id.* at 1065. After examining the activities performed by the Cristos at their various business locations, the Tax Court did note the importance of the work carried on in the home office. *Id.* However, the court found that the taxpayers failed to show the extent or frequency of the work carried on in their home office. *Id.* Therefore, the court held that the Cristos failed to satisfy their burden of proving that the home office was their principal place of business. *Id.*; *see* Welch v. Helvering, 290 U.S. 111, 115 (1933) (citations omitted); *see also* TAX C.R. PR. & P. § 142(a) (1984).

Although the Tax Court did not expressly hold that the apartment house was the Cristos' principal place of business, the court noted that "[w]ithout the apartment house, there would be nothing to rent, [and] no income . . . ." 44 T.C.M. (CCH) at 1065. Therefore, the Tax Court could justify its holding, because the Cristos "failed to [show] that the focal point of the apartment house business was the [home] office room and not the apartment house." *Id.* Thus, it would be reasonable to conclude that the primary business activities of managing and renting apartments were carried on at the apartment house.

fice.[81] Furthermore, the Tax Court's analysis excluded Green's particular circumstances and focused on his various business activities in order to locate the principal place of business.[82] Thus, the focal point standard comports with the congressional intent to objectify the inquiry under which a determination to permit a home office deduction is to be made.[83]

III. The Principal Cases

If employment or continued employment is primarily dependent upon a home office activity and an employer provides an office or space in which significant business activity is performed, the Tax Court will not find the home office to be the principal place of business under the focal point standard. This issue was addressed in the first case of *Drucker v. Commissioner*.[84]

A. *Drucker v. Commissioner*

1. The Facts

The Metropolitan Opera Association ("Met") employed a ninety-three member orchestra to rehearse and perform operas chosen by it during its regular opera season in 1976 and 1977.[85] The performance location of the Met was principally at Lincoln Center in New York City. The Met required its orchestra members to rehearse for thirty weeks during an opera season.[86] In addition, the Met performed for two weeks during the summer months in various New York City parks.[87]

Orchestra employees of the Met complied with the Met rehearsal and performance schedule by spending twenty-six hours per week at Lincoln Center.[88] When not rehearsing or performing, the Met musicians spent many hours practicing their individual parts for current and future productions.[89] However, such individual practice usually occurred at the musicians' homes, because the Met did not have individual practice studios for its employees.[90] Nevertheless, the Met expected the musicians to

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81 *See* 78 T.C. at 432-33; *see also* Jackson v. Commissioner, 76 T.C. 696, 700 (1981).
82 *See* 78 T.C. at 432-33.
83 *See supra* notes 12-23 and accompanying text.
84 79 T.C. 605 (1982), *rev'd*, 715 F.2d 67 (2d Cir. 1983).
85 79 T.C. at 608.
86 Performances at Lincoln Center were scheduled for 27 out of the 30 weeks. *Id.* at 606.
87 *Id.* The Met also toured for 49 days in 1976 and for 48 days in 1977. *Id.* at 607.
88 *Id.*
89 *Id.* at 607-08.
90 *Id.* at 608.

arrive at rehearsals with their parts learned and perfected.[91]

Ernest Drucker was a concert violinist employed by the Met in 1976 and 1977. To maintain his skills as a violinist and to comply with the expectations of his employer, Drucker practiced at his apartment in a room converted into a practice studio.[92] Because Drucker spent in excess of thirty hours a week practicing at home, he claimed that his home studio was his principal place of business[93] and maintained for the convenience of the Met.[94]

2. The Tax Court

While acknowledging that individual practice was necessary, as a practical matter, for Drucker to carry out his employment-related responsibilities, the Tax Court found that individual off-the-premises practice was not requested by the Met and not a condition of Drucker's employment.[95] Therefore, the Tax Court employed the focal point standard to ascertain the Drucker's principal place of business. Moreover, for the first time since *Baie*, the Tax Court expressly articulated the specific factors upon which it would inquire into a taxpayer's business activities. The court would inquire into:

> [1] the nature of the taxpayer's trade or business,
> [2] the various activities of which it [was] constituted, and
> [3] the locations where those activities [were] carried out.[96]

In addition, the court warned that though the number of hours worked at each location would be considered, it was not, by itself, determinative.[97]

The Tax Court proceeded to categorize Drucker's activities as practice, rehearsal, and performance. While the amount of time Drucker spent for practice was slightly greater than that for rehearsal and performance, two-thirds of Drucker's employment activities were at Lincoln Center.[98] There, the Met did provide rehearsal space and the concert hall for performance. The court reasoned that since Drucker was required to attend rehearsals and performances, the available space at Lincoln Center enabled him to dis-

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91 *Id.*

92 Drucker furnished his practice studio with a piano, records, tapes, stereo equipment, musical scores, music stands, and books. *Id.*

93 *Id.* at 609.

94 To be discussed in part V, see *infra* notes 205-11 and accompanying text.

95 79 T.C. at 608.

96 *Id.* at 612.

97 *Id.* (citations omitted); *see also supra* note 77 and accompanying text.

98 *See* 79 T.C. at 613.

charge his employment obligations.[99] Moreover, the court noted that Drucker's job depended upon the quality of his playing at rehearsals and performances. Therefore, the court concluded that the focal point of Drucker's activities was at Lincoln Center.[100]

In addition, the court found that the sole purpose of the Met was to perform operas, and the Met only employed its musicians in furtherance of that purpose.[101] Therefore, the court reasoned that the most important business activity for the Met was public performance, and the location of that activity was Lincoln Center.[102]

In contrast, the dissent in *Drucker* argued that a concert musician was not situated in the same manner as other professionals.[103] The dissent explained that while other taxpayers worked regularly, week after week, at their respective employers' business premises,[104] Drucker spent countless hours perfecting his craft by concentrated practice in his home studio.[105] The dissent also noted that while "retention of [Drucker's] job depended on the quality of his playing at rehearsals [and] performances[,] . . . insufficient practice . . . would have cost [Drucker] his job."[106] Therefore, the dissent reasoned that Drucker's principal place of business was his home studio, because it was of "leading significance *to the taxpayer* in performing his business functions. It [was] where the majority of his business activities [were] accomplished."[107]

Although the dissent's argument has merit when examined from Drucker's point of view, making the inquiry from the taxpayer's perspective would conflict with the congressional mandate to objectively determine where the taxpayer's principal place of business is located.[108] From the taxpayer's viewpoint, there invariably would be circumstances necessitating and justifying use of a home office.[109]

3. The Court of Appeals for the Second Circuit

On appeal,[110] the Second Circuit found that home practice

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99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.* at 617 (Wilbur, J., dissenting).
104 *Id.*
105 *Id.* at 616.
106 *Id.* at 621 (emphasis omitted); *see also* note 111.
107 79 T.C. at 616 (emphasis added).
108 *See supra* text accompanying notes 82-83.
109 *Cf.* Note, *The Deductibility of Home Office Expenses*, *supra* note 10, at 1214-15, nn.133-41.
110 715 F.2d 67 (2d Cir. 1983). Drucker's appeal was consolidated with those of two other Met musicians who were also denied home office deductions for the use of their

was the most important activity in order for the musicians to maintain their status as professionals.[111] Moreover, the Second Circuit reasoned that every business-related activity in which the concert musicians were involved was dependent upon home practice.[112] The Second Circuit found it difficult to reconcile the Tax Court's finding that, although individual practice was a necessity, it was not a requirement or a condition of employment.[113]

Therefore, the Second Circuit treated the musicians' home studios as their principal places of business, noting that the place of performance was immaterial provided the musicians were prepared.[114] The court concluded that "[b]oth in time and in importance, home practice was the 'focal point' of the . . . musicians' employment-related activities."[115]

Although it appears that the Second Circuit adopted the Tax Court dissenters' standard for locating a taxpayer's principal place of business, the Second Circuit did not expressly repudiate the focal point standard employed by the Tax Court.[116] Rather, the Second Circuit explicitly limited its holding in *Drucker* by finding "this the rare situation in which an employee's principal place of business [was] not that of his employer."[117]

Two possible readings emerge from the Second Circuit's treatment of the Tax Court's focal point standard in *Drucker*. One view would be to treat the concert musicians' situation as

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practice studios. *Id.* at 68. *See* Rogers v. Commissioner, 44 T.C.M. (CCH) 1312 (1982), *rev'd sub nom.* Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983); Cherry v. Commissioner, 44 T.C.M. (CCH) 1316 (1982), *rev'd sub nom.* Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983).

111 715 F.2d at 69. Without individual practice, the musicians' skills would atrophy. Musicians are as dependent upon practice as professional runners are on jogging. If, for example, a concert violinist simply stopped practicing, his sense of touch would immediately be impaired. The result would be devastating; the violinist's ability to play the musical notes in tune would be severely curtailed. Practice enables the musician to attain the high level of professional expertise required of a performing artist by providing a foundation on which to master an instrument. Furthermore, the musician can only maintain and refine his skills through individual practice. "The road to violin mastery is long and arduous, and great application and perseverance are needed to reach the goal. Talent helps to ease the way, but in itself it cannot be a substitute for the hard work of practicing." I. GALAMIAN, PRINCIPLES OF VIOLIN PLAYING & TEACHING 93 (1962); *see generally* 1 CARL FLESCH, THE ART OF VIOLIN PLAYING II (2d ed. 1939).

112 715 F.2d at 69.

113 *Id.*

114 The musicians did not always perform at Lincoln Center; performances were also given in New York City parks and on tour. *Id.*; *see also supra* note 87 and accompanying text.

115 715 F.2d at 69.

116 *Id.*

117 *Id.*

being so rare that *Drucker* has no precedential value.[118] Under this view, concert musicians are *sui generis* when compared with other taxpayers. The second reading construes the Second Circuit's decision as creating a limited exception for employees under the focal point standard. Under this view, the Tax Court's objective inquiry shifts to include the taxpayer's particular circumstances.

However, in invoking *Drucker*, the taxpayer would first have to show that:

> (1) his continued employment is primarily dependent upon an essential activity (e.g., individual practice);
> (2) he must perform that activity as a condition of his employment (e.g., learn and perfect orchestrations of specific operatic parts);
> (3) he must perform that activity from his home office because of a compelling circumstance at his place of business (e.g., no space to practice); and
> (4) the home office activity requires substantial time (e.g., regular practice in excess of thirty hours per week).[119]

Once the taxpayer-employee demonstrates these conditions, his home office can justifiably be found to be the focal point of his activities. The question then becomes whether the *Drucker* exception can be applied to a situation where the employee has some space to carry on an essential business activity at his employer's premises, but such space is unsuitable and impairs the employee's ability to properly discharge his duties. This issue was decided in *Weissman v. Commissioner*.[120]

B. *Weissman v. Commissioner*

1. The Facts

Weissman was employed as an associate professor of philosophy at City College of the City University of New York ("City College") in 1976. Weissman was required to prepare and deliver lectures, meet with students, and grade examination papers.[121] Weissman was also required, under the university's

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[118] This view was adopted by the Tax Court in Bilenas v. Commissioner, 47 T.C.M. (CCH) 217, 219 (1983) (adjunct professor was not provided with a separate office at City College of New York and worked at an office in his home to carry on activities connected with his teaching duties); *see* Sternberg v. Commissioner, 48 T.C.M. (CCH) 965 (1984); *see also infra* text accompanying notes 151-65.

[119] *See supra* text accompanying notes 85-94.

[120] 47 T.C.M. (CCH) 520 (1983), *rev'd*, 751 F.2d 52 (2d Cir. 1984).

[121] 47 T.C.M. (CCH) at 521.

bylaws, "to do an unspecified amount of research and writing in his field in order to retain his teaching position."[122]

City College accommodated its faculty members by providing on-campus offices and library facilities.[123] Although Weissman used his on-campus office for his nonclassroom duties, he found the office unsuitable because he had to share it with other professors.[124] The office was not a safe place in which to leave important research and writing materials. There was no typewriter in the office[125] and the library, which was only open on weekdays, did not have typing facilities for professors.[126] Therefore, Weissman used two rooms in his apartment to research and write his book.[127] During the academic year, Weissman spent only fourteen to fifteen hours a week at his on-campus office as opposed to the fifty to sixty hours he worked each week in his apartment.[128]

2. The Tax Court

The Tax Court repudiated Weissman's claim that his home office was his principal place of business entitling him to qualify for a home office deduction. Rather, the court treated Weissman as it had other professors who performed some business activity in their respective home offices by holding that:

> [t]he focal point of those who teach (at both college and secondary school levels) is the educational institution rather than the home office. While research and writing was an important part of [Weissman's] duties . . . it does not shift the focal point of his job away from City College where he taught, met with students, graded examinations, and prepared lectures. This is so even though [Weissman] spent more time each week doing research and writing at home than he spent in teaching and related activities at the college.[129]

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[122] *Id.* The Tax Court found that City College's bylaws provided that "a candidate for promotion to associate professor must possess a record of significant scholarly achievement . . . ." *Id.* In addition, the court found that "scholarly achievement [was] usually measured by research, writing and publication in one's field." *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Weissman furnished his "home office" with a desk, a typewriter, chairs, filing cabinets, and books. *Id.*

[128] Weissman published a book in 1977 as a result of his work at home. *Id.*

[129] *Id.* at 522 (footnotes omitted). For a discussion distinguishing *Weissman* from other tax cases involving professors who used home offices for business purposes, see *infra* text accompanying notes 166-85.

The Tax Court found Weissman's primary business activity to be teaching.[130] Following *Baie*'s focal point standard, the court, in effect, found Weissman's research and writing activities to be secondary in comparison to his on-campus activities even though research and writing were conditions of his employment.[131] Additionally, the court distinguished *Drucker* by finding a concert musician to be in a "different situation from that of a college professor."[132]

3. The Court of Appeals for the Second Circuit

On Weissman's appeal, the Second Circuit found that the Tax Court had erred as a matter of law in failing to consider all the aspects of Weissman's business activities.[133] In ascertaining the location of Weissman's principal place of business, the Second Circuit extrapolated from *Drucker* "that in each case the determination . . . depends on [1] the nature of [the taxpayer's] 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."[134] Furthermore, the Second Circuit had cautioned that the Tax Court's use of the focal point standard, without the teaching of *Drucker*, "create[d] 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."[135] The Second Circuit was concerned that the focal point approach did not distinguish between professors who spent most of their time engaging in teaching-related activities and those professors who spent most of their time re-

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[130] *See* 47 T.C.M. (CCH) at 522.

[131] The Tax Court found that City College did not require Weissman to maintain a home office. *Id.* To determine whether an employer must formally require the maintenance of a home office, see *infra* notes 189-219 and accompanying text.

[132] 47 T.C.M. (CCH) at 523.

[133] 751 F.2d at 514.

[134] *Id.* at 514-15 (footnote omitted). If *Drucker* is to be read to change the factors upon which the inquiry to locate where a taxpayer's principal place of business is, then such a reading could be construed to be similar to the proposed regulations of the Internal Revenue Service. *Id.* at 515 n.5. The Internal Revenue Service proposed that it would determine the location of a taxpayer's principal place of business by examining all the facts and circumstances. The Internal Revenue Service would specifically examine:

> (i) The portion of the total income from the business which is attributable to activities at each location;
>
> (ii) The amount of time spent in activities related to that business at each location; and
>
> (iii) The facilities available to the taxpayer at each location for puposes [sic] of that business.

48 Fed. Reg. 33,322, 33,324 (1983) (to be codified at 26 C.F.R. § 1-280A-2(b)(3)) (proposed July 21, 1983). *But see supra* note 54.

[135] 751 F.2d at 514.

searching and writing.[136]

When the Second Circuit applied *Drucker* to Weissman's situation, it noted that Weissman spent eighty percent of his employment time researching and writing. The Second Circuit reasoned that Weissman needed a private space "to read, think and write without interruption"[137] in much the same way that a musician needed a private place to practice.[138] The Second Circuit found that Weissman's shared office was unsuitable for private research and writing,[139] because Weissman had no other suitable space to work.[140] Therefore, the Second Circuit concluded that Weissman's use of the home office was based on practical necessity,[141] and the court held that Weissman's principal place of business was at his home office. The Second Circuit's argument, then, is predicated upon the view that Weissman's home office activities were essential to his continued employment.[142]

In contrast, the dissent in *Weissman* argued that Weissman was employed to teach,[143] and, therefore, his employer-provided space at City College was adequate for the "acceptable and compensable performance of his job."[144] In addition, the dissent argued that the majority misread *Drucker*; there the musicians were provided with " '*no* space for the essential task of private practice,' "[145] whereas Weissman had an office, a library, and a classroom available for the performance of his job.[146] However, for the majority, the relevant fact linking *Drucker* to *Weissman* was "that . . . [both employers] provided no *suitable* space for engaging in necessary employment-related activities."[147] Therefore, Weissman's home office activity satisfied the *Drucker* exception.[148]

Although the Second Circuit in *Drucker* found the musicians' home studios to be the focal point of their activities, the Second Circuit, in *Weissman*, did not expressly overrule the Tax Court's focal point standard.[149] Rather, the Second Circuit expanded

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136 *Id.*
137 *Id.* at 515.
138 *Id.*
139 *Id.*
140 *See id.* The on-campus library had no space in which Weissman could type manuscripts. *Id.*
141 *Id.*
142 *Id.* at 516.
143 *Id.* at 517 (Kelleher, J., dissenting) (emphasis omitted).
144 *Id.* at 519.
145 *Id.* at 518 (footnote omitted) (quoting *Drucker*, 715 F.2d at 70).
146 *Id.* at 517.
147 *Id.* at 516-17.
148 *Id.*; *see also supra* text accompanying note 119.
149 While the Second Circuit criticized the Tax Court's focal point analysis because it

upon the *Drucker* exception to include those situations where the employee has space available to perform the most significant employment-related activity, but the space is unsuitable and directly impairs the employee's ability to properly discharge those duties necessary for continued employment. However, if an activity is found to be an indispensible one which makes continued employment possible, it is not clear when an employer-provided office or business location becomes so unsuitable that the employee may properly justify use of his home office to invoke the *Drucker-Weissman* limited exception under the focal point standard. Put another way, it is unclear what degree of "practical necessity"[150] will suffice before an employee can claim that he was compelled to work at home to carry on an indispensable activity which makes his continued employment possible.

IV. Testing the Validity of the *Drucker-Weissman* Exception: The Varying Degrees of Necessity

A. *Employees Without Separate Offices at Their Business Locations*

Prior to the Second Circuit's decision in *Weissman*, the Tax Court treated *Drucker* as too rare a situation to have any precedential value.[151] Therefore, the Tax Court uniformly denied home office deductions to taxpayer-employees who had no separate offices at their employer's place of business. Each taxpayer was compelled by some circumstance to perform a portion of his employment-related work at home. Relying on the focal point standard, the Tax Court found that each of the taxpayer's primary business activities were carried on at the employer's premises. To test the validity of the *Drucker-Weissman* exception and to discern the degree of necessity which may properly justify a taxpayer-employee's use of his home office, a review of the aforementioned Tax Court decisions follows.

In *Renner v. Commissioner*,[152] the taxpayer was employed as an art teacher at a community college. When Renner first interviewed for her position, she was required to produce samples of her art.[153] Once employed, Renner was also expected to exhibit

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failed to distinguish Weissman from other professors who primarily engaged in teaching related activities, the Second Circuit expressly stated that "[i]n some circumstances the fact that a professor spends a majority of his working time in his home office will not overcome the presumption that an educator's principal place of business is the college at which he teaches." *Id.* at 516.

150 *Id.* at 514-15.

151 *See supra* note 118 and accompanying text.

152 48 T.C.M. (CCH) 285 (1984).

153 *Id.* at 286.

her artwork.[154] Renner was only required to teach an art class and had no other faculty duties at the college. Although Renner was provided with a classroom, she was not given an office or separate studio.[155] Therefore, to continue to produce new art and store her already existing art, books, supplies, drawings, pictures, and slides, Renner maintained a home studio which she claimed to be her principal place of business.[156]

The Tax Court denied Renner a home office deduction following its decision in *Weissman*. The court found Renner's situation "[in]distinguishable from that of the college teacher who must 'publish or perish' and who uses her home office to perform scholarly research and writing . . . ."[157] Despite Renner's claim that she was required to be a " 'practicing and exhibiting artist' as a condition to [her] employment as an art teacher[,]"[158] the court held that her principal place of business was at the school where she worked.

Although the factual record did not disclose the number of hours or regularity of use that Renner worked in her studio, it seems plausible that, under the Second Circuit's decisions in *Drucker* and *Weissman*, Renner would qualify for a home office deduction. If Renner expected to exhibit her works of art, it would appear that such an activity was a requirement of her employment. However, it needs to be determined whether creating and exhibiting art was essential to her employability as an art teacher. If so, the fact that she had no space at the school to create new art would bring her directly within *Drucker* and *Weissman*.

Similarly, the taxpayer in *Honan v. Commissioner*[159] had no space to carry out an essential business activity which made his continued employment possible. Honan was employed as an airline pilot with his base of operations at LaGuardia Airport in New York City. Honan was required to copilot airplanes during flight sequences, and was required to be "familiar with the contents of flight manuals, air craft [sic] technical manuals, administrative manuals, charts and maps."[160] These documents were important, because they included information regarding air traffic patterns and highly technical information "regarding the aircraft

154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*
159 48 T.C.M. (CCH) 79 (1984).
160 *Id.* at 80.

itself."[161] However, Honan was not provided with any space in which to study this information at LaGuardia Airport, and he was prohibited from studying the information while flying.[162] Therefore, Honan maintained an office in his basement and claimed to have studied the flight materials there for twenty-five to thirty hours per week.[163]

The Tax Court denied Honan a home office deduction despite Honan's need for a place to study. The court, employing the focal point standard, determined that study and revision "were incidental to [Honan's] primary responsibilities which were performed elsewhere."[164] Furthermore, the court disbelieved Honan's claim that his studies took up so much of his time as to warrant shifting the presumption that his home office was his principal place of business.[165]

Honan demonstrates that in addition to the employee's need for a home office, the employee must spend a substantial amount of time therein. However, if Honan had spent a requisite number of hours in his home office studying his materials, he should then fall within the exception. If Honan could not effectively fly without studying the flight materials, home study would become essential. Therefore, the degree of necessity requiring his use of a home office is proportionately greater, and this would enable him to fall within the *Drucker-Weissman* exception. In each situation, the degree of necessity turns on the essentiality of the business activity. In addition, the home activity must, under the exception, consume substantial amounts of time.

B. *Employees with Unsuitable Offices*

The Tax Court has uniformly held that the focal point of a professor's activities is at the college where he teaches.[166] This has been true whether the professor had a private or shared office.

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161 *Id.*
162 *Id.*
163 *Id.* at 82.
164 *Id.* (citation omitted).
165 *See id.* Honan's home office activities also included union work, and it may have been that his 25 to 30 hours spent in the home office were primarily in pursuit of this work. Honan's employer did not require him to be a member of a union. *Id.* at 80.
166 *See, e.g.*, Sternberg v. Commissioner, 48 T.C.M. (CCH) 965 (1984); Bilenas v. Commissioner, 47 T.C.M. (CCH) 217 (1983); Weightman v. Commissioner, 45 T.C.M. (CCH) 167 (1982); Moskovit v. Commissioner, 44 T.C.M. (CCH) 859 (1982), *aff'd mem.*, (10th Cir. Oct. 19, 1983); Storzer v. Commissioner, 44 T.C.M. (CCH) 100 (1982); Strasser v. Commissioner, 42 T.C.M. (CCH) 1125 (1981); Sessions v. Commissioner, 42 T.C.M. (CCH) 205 (1981); Weightman v. Commissioner, 42 T.C.M. (CCH) 104 (1981).

1. A Professor with an Unsuitable Private Office

In *Moskovit v. Commissioner*,[167] the taxpayer was employed as a professor of English at a state university. The university required Moskovit to teach, meet with students, attend departmental meetings, prepare and grade exams, develop new curricula, and research and publish scholarly articles.[168] Moskovit was provided with a private furnished office which was available to him at any time.[169] In addition, he had access to a secretarial staff. However, Moskovit maintained a home office because his typewriter and 2,700 volume library were there, and Moskovit felt that the home office was a cooler place in which to work during the summer months.[170] Moreover, the home office afforded him more privacy than his on-campus office for research and writing activities.[171]

However, assuming that Moskovit's research and writing were his most significant business activities—making his continued employment possible—Moskovit's practical necessity for use of a home office was not equivalent to Weissman's. Moskovit's private office became unsuitable only because he chose to keep his typewriter and books at home.[172] Moskovit's need for privacy was a practical necessity, but it is questionable that a professor could not effectively write in his private office due to some interruptions, and that this should compel the professor to work at home. Even under the *Drucker-Weissman* exception, it would appear that the Tax Court's decision would stand.[173]

2. A Professor with an Unsuitable Shared Office

In *Storzer v. Commissioner*,[174] the taxpayer was employed as an associate professor of French language and literature by Brooklyn College. Storzer's employment requirements included preparing and grading exams, preparing and giving lectures, developing new curricula, performing committee work and community service, meeting with students, and researching and pub-

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167 44 T.C.M. (CCH) 859 (1982).
168 *Id.* at 859-60.
169 *Id.* at 860.
170 *Id.*
171 *See id.* at 861.
172 The Tax Court concluded that even though Moskovit "used his home office to prepare classroom lectures and to conduct scholarly research, both of which were essential to his job as a university professor, they do not serve to shift the focal point of his activities from the University to his home office. This [was] true, notwithstanding the fact that [Moskovit] spent more time each week pursuing his occupation in his home office than he did at the University . . . ." *Id.* (footnotes omitted).
173 *See supra* notes 133-48 and accompanying text.
174 44 T.C.M. (CCH) 100 (1982).

lishing scholarly articles.[175] However, of all Storzer's employment requirements, it was his research and publishing which enabled him to retain his teaching position, achieve tenure, and enhance the prestige of Brooklyn College.[176] Storzer was provided with an office which he had to share with six other professors.[177] In addition, the office contained no typewriter and was frequently burglarized.[178] Further, the faculty was subject to assaults by the students, and Storzer was warned by his department chairman not to use his office at night or on weekends.[179]

To carry out his employment requirements, Storzer used two of three rooms in his apartment as an office.[180] On weekends and holidays, Storzer also conducted his research and writing of articles in his apartment.[181] Storzer claimed a deduction for the business use of his home office.

In denying Storzer a home office deduction, the Tax Court employed its focal point standard and held that the focal point of his activities was at Brooklyn College.[182] This decision should still stand under the *Drucker-Weissman* exception.

While Storzer's research and writing activities were conditions of his employment, and were essential activities upon which his employment depended,[183] Storzer would not be entitled to invoke the *Drucker-Weissman* exception, because his essential research and writing activities were limited to weekends and holidays. Therefore, his research and writing activities were secondary to his other activities such as teaching. Although Storzer's situation rendered his home office use a practical necessity on par with Weissman's,[184] Storzer's regular home office use for the essential business activity was not as substantial in time as was Weissman's home office use for research and writing activities.[185]

In contrasting *Drucker* and *Weissman* to these cases, it be-

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175 *Id.* at 101.
176 *Id.* at 101 n.2.
177 *Id.* at 101.
178 *See id.*
179 *Id.*
180 *Id.*
181 *Id.* Therefore, it is reasonable to infer that Storzer spent most of his weekday evenings engaged in teaching-related activities such as preparing lectures.
182 *Id.* at 102.
183 *See supra* text accompanying note 175.
184 *Weissman*, 751 F.2d at 515-16.
185 *Id.* Under the *Drucker-Weissman* exception, the time spent working at home is an important factor. However, by itself, it cannot be the predominant factor, since the employee would then control, for tax purposes, when his home office was his principal place of business. *See supra* note 54.

comes clear that the exception created by the *Drucker* and *Weissman* decisions is narrow and strict. The exception is predicated upon absolute necessity; that is to say, the mere lack of space or unsuitable space will not suffice to shift the focal point of a taxpayer's business activities from his employer's premises to his home office.[186] Thus, the Second Circuit's limited exception will not affect the Tax Court's focal point analysis unless and until the taxpayer introduces evidence tending to show that the home office activity is essential to continued employment. Furthermore, the employee will have to demonstrate that he performed that activity for a substantial amount of his employment-related time.[187] If the taxpayer-employee meets these criteria, the Tax Court should not only compare the employee's various business activities, but should also include the circumstances which necessitated use of the home office in its calculation. Then the court could justifiably decide that the home office activity is the primary business activity, and hold that the employee's home office is, in fact, his principal place of business.[188] However, before the employee qualifies for the home office deduction, the Tax Court must next decide if the employee's use of the home office was for the convenience of the employer.

V. The Emergence of the Convenience of the Employer Standard for I.R.C. Section 280A(c)

A. *A Requirement Without Meaning*

To further ensure that an employee would not convert nondeductible personal expenses into home office deductions, Congress wrote into I.R.C. section 280A(c) the requirement that the employee's exclusive use of his home office be for the "convenience of his employer."[189] Although Congress did not define that

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186 *See supra* notes 118-49 and accompanying text.

187 *Id.*

188 Although Congress specifically wanted to prevent a taxpayer's subjective circumstances from controlling the inquiry upon which a home office deduction was to be made, *see supra* notes 6-23 and accompanying text, the congressional mandate does not appear to be violated by the *Drucker-Weissman* exception. Because use of a home office is an absolute necessity for continued employment, permitting a deduction under such aforementioned circumstances is reasonable. *See supra* notes 151-87 and accompanying text. In addition, the Tax Court's objective focal point test remains, by and large, intact and can only be modified to include a taxpayer's subjective circumstances if the taxpayer introduces sufficient evidence satisfying the criteria of the limited exception. *Contra*, Comment, *Putting the House in Order*, *supra* note 10, at 537-38; *see also* Note, *Sweet Music To Taxpayers' Ears*, *supra* note 10, at 181-83.

189 I.R.C. § 280A(c)(1); *see also supra* note 9.

phrase,[190] no workable standard emerged for this requirement in the course of home office deduction litigation, because the Tax Court was primarily preoccupied with the principal place of business exception.[191] The Tax Court suggested that in some cases the employer would have to explicitly require the employee to maintain a home office.[192] In another case, the Tax Court implied that the convenience of the employer requirement would be satisfied if the employee's use of a home office was predicated upon a business necessity.[193]

However, the phrase "convenience of the employer" appears in I.R.C. section 119. That section states that the value of meals or lodging furnished to an employee by his employer be specifically excluded from gross income, provided such items were furnished for the convenience of the employer, and if:

> (1) in the case of meals, the meals [were] furnished on the business premises of the employer, or

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190 S. REP. No. 938, *supra* note 12, at 148; H.R. REP. No. 658, *supra* note 12, at 161. Although it was not accepted in conference, the Senate report did provide that if the taxpayer was an employee, the use of a home office had to be "in connection with the trade or business of an employer where the employer provide[d] no office or fixed location for the use of the employee" to carry out his employment responsibilities. S. REP. No. 938, *supra* note 12, at 148.

191 *See, e.g.*, Sternberg v. Commissioner, 48 T.C.M. (CCH) 965 (1984); Honan v. Commissioner, 48 T.C.M. (CCH) 79 (1984); Bilenas v. Commissioner, 47 T.C.M. (CCH) 217 (1983); Wilhelm v. Commissioner, 46 T.C.M. (CCH) 176 (1983); Strasser v. Commissioner, 42 T.C.M. (CCH) 1125 (1981); Kastin v. Commissioner, 40 T.C.M. (CCH) 1071 (1980).

The Internal Revenue Service's position has also been unclear. In 1980, it proposed regulations on how it would interpret I.R.C. § 280A. *See supra* note 54. However, the Internal Revenue Service only repeated the requirement that the home office be used for the convenience of the employer. By 1983, no new proposal was made by the Internal Revenue Service regarding this requirement. Previously, however, the Internal Revenue Service had required that an employee establish:

> (1) that, as a condition of his employment, he is required to provide his own space and facilities for performance of some of his duties,
> (2) that he regularly use[d] a part of his personal residence for that purpose,
> (3) the portion of his personal residence which [was] 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.

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

Although Congress was cognizant of the Internal Revenue Service's position, it did not expressly require a formal requirement to be made by the employer for the employee to use a home office. *See* S. REP. No. 938, *supra* note 12, at 148; H.R. REP. No. 658, *supra* note 12, at 161. Therefore, it is reasonable to infer that Congress would not adhere to the Internal Revenue Service's position. *Contra* Comment, *The Deductibility of Home Office Expenses*, *supra* note 10, at 1219 n.167.

192 *See, e.g.*, Harris v. Commissioner, 46 T.C.M. (CCH) 1130, 1133 (1983); Weightman v. Commissioner, 45 T.C.M. (CCH) 167, 170 (1982); Besch v. Commissioner, 43 T.C.M. (CCH) 286, 288 (1982), *aff'd mem.*, 720 F.2d 682 (7th Cir. 1983); Duffey v. Commissioner, 42 T.C.M. (CCH) 226, 228 (1981).

193 *See* Chauls v. Commissioner, 41 T.C.M. (CCH) 234, 236-37 (1980).

> (2) in the case of lodging, the employee [was] required to accept such lodging on the business premises of his employer as a condition of his employment.[194]

In 1977, the Supreme Court, in *Commissioner v. Kowalski*,[195] provided a single workable definition for the convenience of the employer standard of I.R.C. section 119. After reviewing the administrative and case histories of many attempted definitions, the Supreme Court concluded that the convenience of the employer requirement was satisfied by a business necessity test.[196] In reaching its conclusion, the Supreme Court found *Benaglia v. Commissioner*[197] illuminating.

In *Benaglia*, the taxpayer was employed as a manager of several hotels in Honolulu, Hawaii. These hotels were all owned by one corporation which paid the taxpayer his salary.[198] The taxpayer was required to be on duty at all times and was provided with a suite of rooms in one of the hotels.[199] The taxpayer also received meals at the hotel, but his salary amounts were "fixed without reference to his meals and lodging."[200] Moreover, neither the taxpayer nor his employer ever regarded the meals or lodging as part of Benaglia's salary. Therefore, the taxpayer never included the value of the meals and lodging in the computation of his gross income.[201] However, the Internal Revenue Service claimed the meals and lodging were taxable as income.

The Tax Court held that the meals and lodging furnished to Benaglia were not income, because they were furnished to him for the convenience of his employer.[202] The court specifically reached its conclusion by finding that Benaglia's "residence at the hotel was not by way of compensation for his services . . . personal convenience, comfort or pleasure, *but solely because he could not otherwise perform the services required of him*."[203] Thus, the business necessity of providing the employee with such items so that he could properly perform his employment duties satisfied the convenience of the employer requirement of I.R.C. section 119.[204]

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194 I.R.C. § 119(a).
195 434 U.S. 77 (1977).
196 *Id.* at 85-93.
197 36 B.T.A. 838 (1937).
198 *Id.* at 839.
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.* at 840. Under current law, the value of meals and lodging is specifically excluded from gross income. I.R.C. § 119 (codified at 26 U.S.C. § 119 (1982)).
203 36 B.T.A. at 839 (emphasis added).
204 *See id.* at 839; *see also* Diamond v. Sturr, 221 F.2d 264, 268 (2d Cir. 1955) (discuss-

B. *The Second Circuit Adopts the Business Necessity Standard for I.R.C. Section 280A(c)*

In *Drucker*, the concert musicians not only had to demonstrate that they satisfied the principal place of business exception, but that the use of their home practice studios was for the convenience of the Met.[205] As noted earlier, the Second Circuit found off-the-premises practice a condition of the musicians' employment.[206] In addition, the court found that individual practice was the one activity which enabled the musicians to maintain their skills and learn their orchestral parts.[207] Because the Met provided no space "for the essential task of private practice,"[208] the Second Circuit concluded that "maintenance of residential space exclusively for such [a] purpose was an expense almost entirely additional to nondeductible personal living expenses."[209] Further, the Second Circuit held that the musicians' use of their respective home practice studios satisfied the convenience of the employer requirement, because such use " 'was not "purely a matter of personal convenience, comfort, or economy.". . . Rather, it was a business necessity.' "[210]

From the foregoing, it can be inferred that the degree of business necessity requiring the musicians to use their home studios was one that could only be justified if the taxpayers "could not otherwise perform the services required of [them]."[211] Therefore, it appears that the same degree of necessity that would satisfy the principal place of business exception would satisfy the convenience of the employer requirement.

The Second Circuit similarly held that Weissman satisfied the convenience of the employer requirement, since use of his home office was a practical necessity if he was to "faithfully . . . perform his employment duties."[212] The Second Circuit used the term "practical" to describe the degree of necessity required

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ing, by implication, that business necessity satisfies the convenience of the employer requirement when employees of a state mental institution and a state training school were required to live and receive meals at the institution as a condition of their employment).

205 *See supra* text accompanying notes 111-13.

206 *See supra* text accompanying notes 111-12.

207 715 F.2d at 69.

208 *Id.* at 70.

209 *Id.*

210 *Id.* (citations omitted) (quoting Gestrich v. Commissioner, 74 T.C. 525, 530 (1980), *aff'd mem.*, 681 F.2d 805 (3d Cir. 1982), *quoting Sharon v. Commissioner*, 66 T.C. at 523).

211 *Kowalski*, 434 U.S. at 88 n.21 (quoting Van Rosen v. Commissioner, 17 T.C. 834, 838 (1951), *quoting Benaglia v. Commissioner*, 36 B.T.A. at 839).

212 751 F.2d at 516.

to satisfy the convenience of the employer requirement. Yet, in effect, there may be no substantial difference between "practical" and "absolute" necessity when an employee seeks to qualify for a home office deduction under the principal place of business exception.[213] Therefore, the Second Circuit's employment of "practical" should not obscure the strict degree of necessity that will be required; the taxpayer will still need to show that he could not satisfy his employment obligations without the use of his home office. This suggests that the degree of necessity is "absolute."[214]

A further problem remains for the taxpayer. It may be difficult to demonstrate that the taxpayer's use of a home studio is for his employer's convenience. For example, in *Drucker*, although it may have been a business necessity for the musicians to practice in their individual studios, it was questionable that they maintained their home studios for the Met's convenience. It can be inferred that the Met was concerned with the proper performance of its operas, and that its employees were properly prepared for rehearsals and performances. Therefore, the Second Circuit implicitly suggested that the Met would have an interest in its musicians' home practice activity, because there was a "sufficiently direct relationship"[215] between the musicians' home practice and their performance at the concert hall.[216]

In *Weissman*, there may not have been the same direct relationship between research and teaching as between practice and performance in *Drucker*. However, as noted earlier, the Second Circuit found Weissman's home office activity to be of the same nature as the musicians' home practice; Weissman's research and writing enabled him to maintain his employment.[217] Therefore, City College had an interest in Weissman's home office activities as well.[218] Moreover, the Second Circuit noted that the "maintenance of a home office was not a personal preference of [Weissman]; it spared the employer the cost of providing a suitable

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[213] *But cf.* Caratan v. Commissioner, 442 F.2d 606, 609 (9th Cir. 1971), *rev'g* 52 T.C. 960 (1969) (the Ninth Circuit remarked that where the employee must accept lodging, it may not be necessary to show that the employee's duties would be impossible to perform without his employer-provided lodging to satisfy the test for I.R.C. § 119).

[214] *See supra* notes 152-87 and accompanying text.

[215] Adams v. United States, 585 F.2d 1060, 1064-65 (Ct. Cl. 1978) (cited by the Second Circuit in *Drucker*, 715 F.2d at 70).

[216] *See* 715 F.2d at 70 (citing *Adams*, 585 F.2d at 1064-65).

[217] *See supra* text accompanying note 142.

[218] *See* 751 F.2d at 516-17 (this interest was drawn from the university's bylaw requirement that Weissman research and write).

private office . . . ."[219]

It appears, however, that the Second Circuit is trying to satisfy the convenience of the employer requirement with both a business necessity test and a direct interest test. If the employee, under the business necessity test, could not otherwise carry out his employment responsibilities without the home office, it should not be necessary to further show that the employer had an interest in the home office activity. The business necessity test, predicated on the extreme conditions requiring a home office, should suffice.

VI. The *Drucker-Weissman* Exception: Implications for Artist-Employees Using Home Studios

The Second Circuit's decisions in *Drucker* and *Weissman* should be welcome news for artist-employees who require the privacy of a home office. Concert musicians, dancers, opera singers, composers, lyricists, conductors, playwrights, painters, and sculptors may require individual studios to work in to perfect their arts and, thereby, satisfy their employment requirements. When a home office is required because of some compelling circumstance which directly impairs the artist's ability to carry out an essential business activity at his employer's premises, an artist may qualify for a home office deduction using the *Drucker-Weissman* exception. The following section posits two hypothetical situations in which artist-employees often find themselves, and explores whether the artists could qualify for a home office deduction using the *Drucker-Weissman* exception. In addition, the potential problems that may arise under the exception are presented.

A. *The Concert Musician as Teacher and Performer at a University*

1. The Facts

A violinist is employed as an associate professor of music by a university. He is required to teach a course in music appreciation, to give individual violin lessons to university students, and to coach student chamber ensembles. The violinist is also required to perform with other faculty members, who comprise a string quartet known as the Ionian Chamber Players, in several concerts at the university. The university expects the quartet to perform all over the country so as to enhance the school's repu-

[219] *See id.* at 517.

tation as a center for the performing arts. These touring concerts usually occur at the end of a semester to avoid conflicts with the musicians' teaching of classes.

To accommodate the violinist in his teaching endeavors, the university provides a small office which the violinist shares with the other members of the quartet. In addition, he is provided with a classroom for lectures and violin and chamber music classes. However, because the building was not originally designed to be used for musical purposes, the acoustics in the classroom make it extremely difficult for the violinist to listen critically to his students play to properly instruct them. Although the university has an auditorium where musicians perform, the auditorium is not usually available to the musicians for practice. The violinist finds it necessary to practice in the large room of his three room apartment, due to the university's inadequate practice rooms. He practices the violin for about thirty hours a week to maintain his mastery of the violin and to learn new repertoire.[220] In addition, the quartet rehearses in the violinist's practice room three times a week for two hours. Because quartet playing is very much dependent upon listening to each player, use of the university's classrooms is not considered a viable option given the poor acoustics.

The violinist recently learned of *Weissman v. Commissioner* and now wants to deduct $1,180, representing one-third of his rent and electricity, as costs associated with the business use of his home studio. He is paid $20,000 per year and claims the home office deduction under the principal place of business exception.

2. *Drucker* and *Weissman* Applied to I.R.C. Section 280A(c)

a. *The Exclusive Use Requirement.* The Tax Court has literally applied the exclusive use requirement to mean that any commingling of personal use with business use of a home will not satisfy the requirement.[221] The violinist will have no problem with this

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[220] The violinist spends only 15 to 20 hours per week at the university.

[221] *See, e.g.*, Harris v. Commissioner, 46 T.C.M. (CCH) 1130, 1133 (1983); Weightman v. Commissioner, 42 T.C.M. (CCH) 104, 107-08 (1981); Hughes v. Commissioner, 41 T.C.M. (CCH) 1153, 1159 (1981); Gomez v. Commissioner, 41 T.C.M. (CCH) 585, 586 (1980); Weiner v. Commissioner, 40 T.C.M. (CCH) 977, 978 (1980).

Congress had defined "exclusive use," for the purpose of I.R.C. § 280A(c)(1), to mean "that the taxpayer must use a specific part of [the home office] solely for the purpose of carrying on his trade or business. The use of a portion of a [home office] for both personal purposes and for the carrying on of a trade or business does not meet the exclusive use test." S. REP. No. 938, *supra* note 12, at 148; H.R. REP. No. 658, *supra* note 12, at 161.

In implementing the congressional mandate, the Tax Court has suggested that if

requirement, because he uses his home studio solely for individual practice and quartet rehearsals. Since he is employed to both teach and perform, individual practice is a condition of his employment.[222]

b. *The Regular Use Requirement.* In addition, the Tax Court has applied the regular use requirement to mean that the home office must be used on a continuous basis.[223] The violinist satisfies this requirement as well, because he practices for thirty hours a week and rehearses for an additional six hours a week with the quartet. However, if his only home office activities are quartet rehearsals, such activities might not satisfy the requirement.[224]

c. *The Principal Place of Business Exception.* The violinist will try to invoke the *Drucker-Weissman* exception under the Tax Court's focal point standard to satisfy the principal place of business exception. He will argue that it is his home practice activity which makes possible his quartet playing and directly aids him in his violin and chamber music lessons. In addition, the violinist will argue that he can only practice at home, because his classroom is unsuitable due to the poor acoustics.

Although the violinist's individual home practice directly makes possible his continued and effective performance with the quartet, his practice is only helpful to his teaching activities. For example, when the violinist demonstrates how a particular passage is to be played at a violin lesson, he need not spend more than a few moments of home practice in preparing the passage. In contrast, when the violinist performs the same passage as part of a larger work with the quartet in actual performance, it is more likely that he spends a greater amount of time practicing the passage. This is because playing a musical passage for demonstration purposes in teaching is inherently different from playing the

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the taxpayer maintains some portion of a room which is separate and exclusive from the portion that is used for personal purposes, the exclusive use requirement may not be violated even though there is no actual physical partition. Weightman v. Commissioner, 42 T.C.M. (CCH) at 107-08.

222 *See Drucker*, 79 T.C. at 606-09.

223 *See, e.g.*, Honan v. Commissioner, 48 T.C.M. (CCH) 79 (1984); Cristo v. Commissioner, 44 T.C.M. (CCH) 1057 (1982); Green v. Commissioner, 78 T.C. 428 (1982), *rev'd in part*, 707 F.2d 404 (9th Cir. 1983); Borom v. Commissioner, 41 T.C.M. (CCH) 179 (1980).

Congress had also defined regular use of a home office as use on a "regular basis . . . . Expenses attributable to incidental or occasional trade or business use of an exclusive portion of a [home office] would not be deductible." S. REP. No. 938, *supra* note 12, at 148-49; H.R. REP. No. 658, *supra* note 12, at 161.

224 *See* Cristo v. Commissioner, 44 T.C.M. (CCH) 1057 (1982); *cf.* Honan v. Commissioner, 48 T.C.M. (CCH) 79 (1984).

same passage for an audience during performance.[225]

The violinist teaches classes and performs at the university. The fact that his classroom is unsuitable for individual practice and quartet rehearsals, due to its poor acoustics, may very well be the type of subjective circumstances that Congress sought to eradicate from the area of home office deductions.[226] However, the violinist spends most of his employment-related time practicing and rehearsing with the quartet at his home studio. If the acoustics in the classroom make quartet rehearsals and individual practice impossible to perform, the violinist may have sufficient necessity to invoke the limited exception of *Drucker* and *Weissman*.

d. *The Convenience of the Employer Requirement.* Assuming that the violinist satisfies the principal place of business requirement, he, in all likelihood, will have demonstrated the requisite necessity to satisfy the convenience of the employer requirement as well.[227] In addition, the violinist can plausibly argue that he incurred additional expenses at home for the business use of his studio, and the use of the practice studio saves the university the cost of providing him with a more suitable classroom.[228]

e. *The Limitation on the Deduction Requirement.* Finally, under the limitation deduction requirement, the violinist may only deduct an amount less than his gross income over other deductions taken on his apartment.[229] Therefore, the deduction of $1,180 meets the statutory requirement; the violinist's gross income is $20,000, and he has taken no other deductions for his apartment.

B. *The Concert Musician of a World Famous Orchestra*

1. The Facts

A cellist is employed by the National Philharmonic as its principal cellist. His situation is similar to that of the Met musi-

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[225] *See* 2 CARL FLESCH, THE ART OF VIOLIN PLAYING: ARTISTIC REALIZATION & INSTRUCTION 129, 130 (2d ed. 1930).

[226] Strasser v. Commissioner, 42 T.C.M. (CCH) 1125 (1981) (taxpayer worked in home office because she felt university-provided private office was unsafe after regular hours); Sessions v. Commissioner, 42 T.C.M. (CCH) 205 (1981) (taxpayer worked in his home office researching and writing because his university-provided private office was not cooled or heated in the late evenings or on weekends); *see also* Lipp v. Commissioner, 42 T.C.M. (CCH) 279 (1981) (taxpayer conceded that she was not entitled to an I.R.C. § 280A(c)(1)(A) deduction even though she was compelled to work at home because of her allergy to tobacco smoke which permeated her employer-provided office).

[227] *See supra* text accompanying notes 210-14.

[228] *See supra* text accompanying note 219.

[229] *See* I.R.C. § 280A(c)(5).

cians, but with two exceptions. The National Philharmonic has several large rooms within its concert hall which the musicians use to warm up before a rehearsal or performance. However, the rooms offer no privacy to the musicians for individual practice. In order to practice adequately, the cellist has to use the music studio in his home.

In addition, the cellist uses his home studio as a location to give private cello lessons. He manages to see two students a day for four days a week. Although he spends most of his time practicing, he believes that it is important to pass on his art, especially when it pays him $75 an hour.

The cellist has also learned of *Weissman v. Commissioner* and claims that his home office is his principal place of business. It is undisputed that he regularly uses his home studio, and that he maintains it for the convenience of his employer.

2. *Weissman* Applied

The cellist argues that he exclusively uses his practice studio as a concert musician. However, the cellist is in two separate businesses; he is an employee of the National Philharmonic and is a private self-employed cello teacher.[230] Although he is a cellist in both businesses, he derives a separate income from each activity. Therefore, it is questionable whether his studio use for practicing and for teaching can coexist without violating the exclusive use requirement. The Tax Court has not expressed an opinion on an individual's multi-business use situation for the exclusive use requirement.[231] However, as long as each of the cellist's uses is for business purposes, the exclusive use requirement need not be violated. As noted earlier, Congress was primarily concerned with taxpayer abuse of intermingling personal and business uses of a home office.[232]

The cellist also argues that except for the warm-up rooms at his employer's premises, his situation is indistinguishable from the Met musicians in *Drucker*. In addition, the cellist points out that the warm-up rooms are unsuitable for individual practice, because they do not provide the requisite privacy a musician needs for concentrated practice. Since his business activities of

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[230] *See* Curphey v. Commissioner, 73 T.C. 766 (1980).

[231] Dempsey v. Commissioner, 44 T.C.M. (CCH) 1319, 1322 (1982); *cf.* Frankel v. Commissioner, 82 T.C. 318 (1984) (taxpayer did not violate the exclusive use requirement when she used the home office for one business purpose and her spouse used the home office for another business purpose).

[232] *See supra* notes 6-23 and accompanying text.

rehearsal and performance with the National Philharmonic are solely dependent upon his individual practice, it appears that the cellist may properly invoke the *Drucker-Weissman* exception: practice is a condition of his employment; it is an essential activity which makes continued employment possible; it is carried on at his home studio; and the cellist regularly spends substantial amounts of time in practicing.[233]

VII. Conclusion

Congress imposed a very strict and objective standard before a taxpayer could qualify for a home office deduction, and the Tax Court's focal point test satisfies that standard when a taxpayer's principal place of business is in question. However, a limited exception now may be invoked to permit a taxpayer's subjective circumstances to be included in the determination, but only when that home office activity makes continued employment possible. The Second Circuit's decisions in *Drucker* and *Weissman* are reasonable and do not appear to violate the congressional mandate. In addition, the convenience of the employer requirement now has a workable standard by which the Internal Revenue Service can ascertain when an employee's exclusive use of his home office is for his employer's convenience. That standard need only be a business necessity test. Finally, these decisions should be of particular importance to artist-employees who find it necessary to perfect their art at home, and who would not have otherwise been able to qualify for a home office deduction under I.R.C. section 280A(c)(1)(A).

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[233] The cellist has one final problem; assuming he can take a home office deduction for both business activities, he will need to know from which part of his tax return he should take the deduction. As an employee, he may take a home office deduction only if he itemizes, and the calculation will be from adjusted gross income. *See* I.R.C. §§ 62-63. But, as a self-employed cello teacher, he may properly deduct the business costs associated with the use of his home from gross income in arriving at his adjusted gross income. Thus, the cellist will argue that he should be permitted to use the latter method so that he will not have to itemize.