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**DEDUCTIBILITY OF BUSINESS EXPENSES: THE
EMPLOYEE/INDEPENDENT CONTRACTOR
CONTROVERSY**

by

Richard J. Kraus *
Vincent R. Barrella**

INTRODUCTION

A person who performs services as an employee may deduct unreimbursed expenses in the performance of those services. The miscellaneous itemized deductions section of Form 1040, Schedule A, permits a list of those deductions on that form or on an attached document. These itemized deductions, however, are subject to certain limitations: they must exceed 2% of the taxpayer's adjusted gross income (AGI)¹; and the taxpayer may have alternative minimum tax requirements.²

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On the other hand, a person who performs services as a statutory employee within any of four categories including drivers, full-time life insurance sales agents, work-at-home individuals and full-time traveling salesperson³ or an independent contractor may deduct business expenses through the use of Form 1040, Schedule C, without any limitation imposed on the miscellaneous itemized deductions and without the adverse ramifications of the alternative minimum tax with respect to those deductions.

This article examines the advantages and disadvantages of requirements to use Schedule A or Schedule C, the definitions of common law employee and independent contractor and a number of recent cases which assist the professional tax counselor in formulating a plan of advice for clients. These clients include workers in the following businesses: teaching, building and construction, trucking, computers, automobiles, attorneys, taxi cab drivers and salespersons. The article concludes with a specific plan for assisting clients who face the tax dilemma of working as consultants or advisors for businesses.

ADVANTAGES AND DISADVANTAGES OF TAX STATUS

While independent contractors and statutory employees may use Schedule C to claim business deductions, these persons will be subject to pay self-employment tax upon the profits gained from the business, if the party for whom they work has not already paid those taxes.⁴ On the other hand, as already indicated, common law employees are subject to the 2% AGI limitation. The range of deductions on Schedule C, however, noticeably list expenses such as advertising, fees, contract labor, depletion, employee benefits, insurance, mortgage payments, professional fees, office expenses, rents,

repairs, supplies, utilities and wages which are not contained on Schedule A. This schedule emphasizes unreimbursed employee expenses such as job travel, job education, vehicle expenses and meals and entertainment, which may also be claimed on Schedule C.⁵ A worker usually prefers to claim independent contractor or statutory employee status so as to be able to deduct a wide range of expenses associated with the worker's business activity.

**DEFINITIONS: COMMON LAW EMPLOYEE;
INDEPENDENT CONTRACTOR**

The Code, as has been noted above, explicitly defines and describes a statutory employee as an individual who usually belongs within one of four categories: driver, life insurance sales agent, home worker, full-time traveling salesperson. Statutory employees receive a W-2 form on which their status is noted.⁶ This article concentrates upon the distinction between common law employee and independent contractor.

Common Law Employee

Although the Internal Revenue Code assesses income tax against taxpayers who perform services as an employee, the Code nowhere defines the term "employee" so that the common law rules apply to the definition.⁷ Many specific facts and circumstances assist in the determination of the employee status. The degree of control exercised over the employee by the employer or principal is paramount; but the cases also weigh other relevant factors: worker investment in the work facility, the possibility of individual profit or loss, payment to the worker by the job or by the time, the power of the principal to discharge an individual without the payment of any damages other than back wages and other contractually agreed amounts,

the principal's regular business activity, the permanency of the work relationship, the perception of the parties about the relationship and the provision of employee benefits.⁸

Independent Contractor

The common law and statutes define an "independent contractor" as one who works for another, but the independent contractor has the right to control the means and methods of completing the work requested. The principal only has the right to control or direct the result of the work and may refuse to pay if not reasonably satisfied.⁹

The Tax Court often examines the substance of the relationship between the principal and the one who is working. It does not matter if the individual is employed part-time rather than full-time and no distinction is made between classes of employees so that officers of corporations, managers and other supervisory personnel are all employees. The only exception to this treatment concerns temporary leased staffing services that provide secretaries, nurses, and other trained workers on a temporary basis – these leased employees work for the staffing services who supply them.

In addition to statutory employees, furthermore, the Code lists statutory non-employees such as direct sellers, real estate agents and certain companion sitters employed on a fee basis and who work under a written contract designating them as non-employees. It should be noted that direct sellers include sellers of consumer products from their own homes or places of business, sellers engaged in delivering or distributing newspapers and others who earn income based on the productivity of their direct sales.¹⁰

CONTROVERSIES: OPPORTUNITIES FOR A PLAN

Many Tax Court cases have applied the statutory criteria to determine the tax status of a worker. Court applications concentrate upon controversies which present opportunities to understand and appreciate the necessary complexity of Code rules and to frame a plan of action for tax clients.

*Rosato v. Commissioner*¹¹

In 1975 Thomas Rosato signed a contract with the O.C. Tanner Company to work as a salesperson for its products and services which assist companies to develop programs for recognizing and rewarding their employees. Mr. Rosato worked the New York City area sales territory in accord with this agreement which designated him as the company's employee, subject to an anti-competition clause, who was to devote his full time and best efforts to the service of the company. Rosato was permitted to participate in Tanner's retirement plan and its medical insurance and group term life insurance plans. Additionally, during the tax year 2006, at issue in this case, Rosato managed Tanner's regional office in the city; he supervised salespersons, secretaries and other personnel whom Tanner had hired. Rosato was required to, and did, attend company meetings and training sessions and he was often present at the company's New York City office, but Tanner considered him to be an at-will employee.

The agreement noted, however, that Rosato was to pay all expenses in excess of his expense allowance and would not be reimbursed for these expenses. Tanner did not set Rosato's work hours or instruct him when to work and he was permitted to perform some of his sales work from his home. Rosato paid a portion of his office rent, half the cost of his personal

secretary and of his own personal assistant; Rosato also paid commissions to other Tanner salespersons from his own commissions. Rosato did not receive reimbursements from Tanner for all of the business expenses which he reported on his monthly regional expense report, including phone, utility, postage, customer entertainment, office supplies and meal expenses.

For all of the tax years prior to 2006, Rosato had filed Form 1040 with Schedule A attached requesting deductions for unreimbursed employee expenses. For the 2006 tax year, however, Rosato left Form 1040, line 7, "Wages, salaries, tips, etc." blank and used Schedule C, "Profit of loss from Business," in order to report gross receipts and sales of \$468,378. Rosato decided upon this plan of action even though he had received a Form W-2 Wage and Tax Statement from Tanner which had not checked the "statutory employee" box on the form's face.

The court agreed with the IRS determination that Rosato was a common law employee despite Rosato's arguments that he was either a statutory employee or an independent contractor.¹²

The court reasoned that an individual taxpayer may qualify as a statutory employee only if the individual is not a common law employee. The court then used the series of criteria mentioned above to determine Rosato's status:

Control: The Company exercised a good deal of control over Rosato: he was required to attend sales meetings, maintain an office presence and not compete; superiors at Tanner supervised his work.

The Perception of the Parties: Tanner and Rosato entered a written contract in 1975 which was superseded by a Golden Rule principle oral agreement in 1984, which honored the terms of the written agreement. Both the written and oral agreements named Rosato as an employee with specific salesperson's duties and as a worker who would receive Form W-2 at the end of the work year.

Worker Investment in the Work Facility: Rosato had to contribute to office rent and to the payment of office workers, but this factor must be weighed against other determinants. In addition, the court observed that there were no detailed terms for this arrangement and that it was Rosato's personal decision to incur additional costs by hiring a secretary and administrative assistant. Rosato did claim that he worked from his home on occasion, but he never presented any evidence of expenses to establish a home office.

The Possibility of Individual Profit or Loss: Rosato was not paid a wage but was awarded commissions; additionally, because he shared expenses with Tanner he did risk a net loss if his profits did not exceed those expenses.

The Provision of Employee Benefits: The contract between Rosato and Tanner included retirement plan participation, medical and life insurance plans and unemployment insurance; Rosato obviously received benefits and, despite indications of an independent contractor status, the reception of these benefits strongly indicates an employer-employee relationship.

Payment to the Worker by the Job or by the Time: The court observed that Rosato's pay came from the commissions for his sales activity and was not based upon time; Rosato, in fact, could set his own time schedule.

The Principal's Regular Business Activity: The court relied strongly upon the fact that Rosato was engaged solely in the regular business activity of Tanner and that he could not compete with them in any similar business; such a fact strongly indicates his employee status.

The Permanency of the Work Relationship: The facts indicate that Rosato had been working for Tanner since 1975; thirty-one years of employment, of receipts of W-2 forms for that entire time indicated to the court that the work relationship was quite permanent.

The Power of the Principal to Discharge an Individual: Tanner considered Rosato to be an employee at will and retained the right to discharge him at any time; this fact again strongly indicates an employer-employee relationship.

*Feaster v. Commissioner*¹³

A second Tax Court decision held that an accountant acted as a common law employee rather than an independent contractor. Daniel Feaster could not use Schedule C but was required to list the unreimbursed business expenses on Schedule A.

From 2002 to 2009, Feaster performed field auditing services for William Langer and Associates of South Carolina. He had provided his employer with a completed W-4 form, Employee's Withholding Allowance Certificate, and W-2s had been issued to him throughout his time of employment. Feaster's employee job description set time limits on the performance of his work, its quality, his customer charges, his progress reports and his submission of weekly itineraries.

His job description indicated that cases were to be completed and that federal, state, county and city taxes would be deducted from the billable hours for which he was paid. During the 2006 tax year, at issue in this case, Langer paid Feaster \$29,650 in wages and withheld federal income, Social Security and Medicare tax; Feaster received reimbursement of \$6,764 for his expenses.

Even though he received his regular W-2 form, Feaster filed his 2006, Form 1040, federal income tax return with a Schedule C attached; Feaster claimed that he was an independent contractor entitled to deductions for car, office, travel and meal and home office expenses. In an explanatory note concerning the forms and schedules filed, Feaster indicated that his self-employment tax had been partially paid by one of his clients, Langer, and that that same client deducted the necessary Social Security and Medicare tax.

The Internal Revenue Service issued a notice of deficiency against Feaster indicating that he was neither a statutory employee nor an independent contractor.

The Tax Court in this case closely followed the reasoning of the *Rosato* decision. After noting that Feaster did not claim he was a statutory employee, the court indicated that Langer's control over Feaster's work sufficed: the accountant's job description, the acceptance of employer guidelines concerning case time limits, frequency of submissions, charges to the customer, submission of itineraries and case closings signified constant employer supervision. Feaster had indicated that he was not very good about communicating with Langer and Langer never objected to this failure. But the employer had either controlled, or had power to control, its employee.

The other elements used to determine whether or not Feaster qualified as an independent contractor also clearly indicated that he was a common law employee under the *control* of the parties. The *perception of the parties* was clearly indicated in the employment agreement under the issuance of Form W-2 during the entire course of Feaster's employment. Although Feaster had to supply his own internet service and at times worked out of his home, his *investment in the business* was not considerable because he was reimbursed for hotel, meal and vehicle mileage and he had no possibility of individual *profit or loss*. Langer also provided health insurance, life insurance and retirement plan *benefits* which were available even if not used by Feaster. Feaster also received an hourly wage subject to an increase or decrease depending upon his performance – he was paid by the *time he worked*, and not by the cases he completed. Feaster's work was part of the principal's *regular business* and the accountant worked for an extended period of time so that the employment was considered to be *permanent*. In addition, Langer, the principal, possessed the *power to discharge* Feaster at any time.

The taxpayer, then, had the obligation to use Schedule A for the declaration of unreimbursed business expenses and did not have the right to use Schedule C in order to amplify those expenses.

*Robinson v. Commissioner*¹⁴

The *Robinson* decision and the *Hathaway*¹⁵ determination, which follows, held that a college professor and a traveling sales representative for a clothing manufacturer could properly be designated as independent contractors. Both of these individuals, then, could use the expanded benefits for the declaration of business expenses available under Schedule

C, but were obligated to pay self-employment and other taxes associated with such designation.

Robinson worked as a full time criminal justice professor for Rowan University, located in southern New Jersey. At the same time he held a position at Temple University in Philadelphia as an adjunct professor: he was a vocational instructor in its Criminal Justice Training Program, a non-credit course of studies required by Pennsylvania state law for Pennsylvania police officers and other criminal justice personnel. Robinson was not responsible for managing the enrollment of his classes, but at the same time bore no risk of loss for under enrollment, nor the possibility of earning a profit. Topics he taught were mandated by the State of Pennsylvania; Temple supplied Robinson with those topics, but Robinson many times wrote or edited the entire curriculum which then became the property of Temple University.

From 1985 to 1996 Temple treated Robinson as an independent contractor and supplied him with Form 1099-MISC Miscellaneous Income statements for his income tax return. After this time Temple began to treat Robinson as an employee and report his income on Form W-2. Robinson requested the university to treat him as an independent contractor, but the university refused.

Temple did not supply Robinson with an office and Robinson completed his Temple assigned work in his home office. Prior to the tax year 2004 Robinson had filed Form 1040 with a Schedule C attached; in a dispute with the Internal Revenue Service about one of these prior tax returns, the Service had stipulated that Robinson had no deficiency for the tax year in issue, without determining that Robinson was an independent contractor. For the tax years 2004 and 2005 Robinson continued to file Form 1040 with a Schedule C

attached, but did not file the 2004 return until 4-19-07 and the 2005 return until 6-13-07.

On the 2004 Schedule C, Robinson and his market company manager wife claimed income of \$1,795 and expenses totaling \$25,164 relating to Robinson's services to Temple. On the 2005 Schedule C, Robinson and his wife claimed income of \$4,045 and expenses totaling \$26,825 from Robinson's work at Temple.¹⁶ In late 2007, the IRS mailed letters to Robinson and his wife in order to indicate that their 2004 and 2005 tax returns would be examined.

At the examination, Robinson provided no documentation substantiating his reported expenses, although Robinson did continue to indicate that he should be treated as an independent contractor. The Service determined that Robinson was a common law employee but the Tax Court reversed this determination.

As in all decisions dealing with this matter, the Tax Court examined a number of relevant factors to determine whether Robinson acted as an independent contractor in his instructor work for Temple University. These same nine factors were discussed in detail in the *Rosato* decision above: degree of control; perception of the parties; work facilities investment; individual profit or loss; employee benefits; payment by job or by time; regular business activity; permanency of relationship; power to discharge.

The court observed that an adjunct professorship such as Robinson's position at Temple usually involves the university assignment of the courses to be taught and where to teach them. Robinson's duties at Temple, however, were similar to other situations¹⁷ in which schools hired professors to teach in somewhat independent non-credit programs:

Robinson's work as a vocational instructor in a non-credit criminal justice training program. Robinson wrote course materials and syllabi for topics supplied by the state of Pennsylvania, which paid Temple University for the courses. The university did set time deadlines for the completion of the work, but did not exercise control over how Robinson completed the work. The *control test* suggests that Robinson is an independent contractor.

The *perception of the parties* clearly indicated that Temple University considered Robinson a common law employee when it began to issue him W-2 forms beginning in 1996; but Robinson had formally been treated as an independent contractor and contended that he continued to operate independently. In addition, the university did not provide Robinson with any office space in which to write and update course materials so that Robinson's *work facilities investment* could have included a home office. Robinson's *individual profit or loss* would stem not only from the enrollment success of the courses which he taught but also from the expert testimony and other criminal justice training course opportunities which would result from his work. Robinson also received no *employee benefits* from Temple, reinforcing his independent contractor status. Although Robinson was paid by the hour for his teaching duties, his *fee for writing* suggests an independent contractor relationship with Temple. Since the university is not a police training academy, Robinson's work of teaching non-credit courses to police officers through contracts with the state of Pennsylvania is not an essential part of Temple's *regular business*. Although Robinson taught in the criminal justice training program for many years, his employment during the tax years 2004 and 2005 were minimal and the relative *permanence of the work relationship* is also arguably minimal. Because Robinson's contracts with Temple were not provided, it is difficult to

determine whether or not the principal could discharge its alleged employee. Several letters during 2004 and 2005, however, indicate that Robinson was hired by the university separately for individual jobs during each year. Temple's recourse, therefore, would be to not hire him for future projects, but the university would not have the *power to discharge* him in the midst of his duties.

Despite his status as an independent contractor, however, Robinson's Schedule C claims for expenses were not allowed due to his tremendously inadequate record keeping. Robinson provided no receipts or invoices, but only some cancelled checks and credit card statements which did not give any details about the items purchased or the expenses incurred for other matters.

Due to his inaccurate filings, Robinson was held responsible for accuracy related penalties under IRC Sec. 6662(a).¹⁸

*Hathaway v. Commissioner*¹⁹

Hathaway began working as a traveling sales representative in 1969. During the tax years 1989 and 1990, the years in issue in this case, Hathaway worked for The Apparel Group, Ltd. (TAG). TAG manufactured clothing and its wholesale distribution and retail sale. Hathaway assisted in the distribution of men's clothing to retail customers during fall and spring sales seasons. Hathaway and twenty-two other sales representatives were experienced professionals, most of whom had been working for TAG for more than twenty years.

Each representative had his own exclusive territory. If a sales representative made a sale outside of the assigned territory, the sales representative to whom the territory was

assigned would receive the commission. Early in 1990 and during the tax years in question, Hathaway's sales territory included North Carolina, South Carolina, Wyoming and parts of Minnesota; he traveled throughout these this territory but also maintained showrooms where he solicited sales.

TAG gave no sales training to Hathaway. He and the other representatives used their own creativity and experience. They changed their methods and used their own business judgment to effectuate sales and to schedule their time. In addition, TAG provided no customer leads nor were the representatives required to report on leads to TAG. TAG did have two sales meetings each year but did not require the representatives to attend. This company's sales procedure manual detailed ways in which orders were to be placed with TAG and did request representatives to submit their schedules, but these provisions were not followed; the manual also reserved sales cancellation rights to TAG, but TAG always accepted the representatives recommendations in this regard.

Hathaway communicated with TAG minimally throughout the time of his work for the company: he sent his orders on a scratch pad which were then documented on TAG forms. Credit reports were required but no other type of report was used. Otherwise, Hathaway reported to TAG on an irregular basis. He spoke by phone from time to time to the company's national sales manager, who did have final approval when a special sales arrangement was made with a major company.

TAG paid its representatives on a commission basis and permitted a draw against the previously earned commission's reserve. TAG issued Forms W-2 to Hathaway in the amounts of \$102,837.28 in 1989 and \$129,283.05 for 1990; federal income taxes and Social Security (FICA) taxes were withheld.

Hathaway also participated in the TAG pension plan and the company provided him with disability, life and medical insurance benefits.

Hathaway's expenses for the tax years in question were considerable: he and other representatives had to pay their own travel, lodging, telephone and food expenses; a portion of his moving expenses, a percentage of advertising expenses and for any other materials besides order forms, swatch cards and preaddressed envelopes. Hathaway spent approximately \$2,000 per year on the tools of his trade such as sample cases, business cards and stationery.

Hathaway also had to maintain his own business quarters, one in his home in Iowa and the other in a Minnesota mall. The business quarters included an office space with desk, computer, printer, bookshelf system, fax machine, copying machine and filing cabinets. His quarters also had a showroom with display tables and full glass racks to exhibit TAG merchandise. Hathaway also had to employ order writers and people to assist him at apparel shows.

If the costs of Hathaway's work in soliciting sales were greater than the commissions generated then Hathaway would have operated at a loss; he would also have suffered a loss as the result of his guaranteeing the credit of a purchaser on an account, which he did from time to time at the request of the company.

In addition, during 1989 and 1990, Hathaway handled noncompeting merchandise for a glove company for which he received commissions. Even if Hathaway were terminated by the company, he would retain commissions on eighty-five percent of unshipped orders. TAG would retain the other fifteen percent to cover the costs of orders that may later be cancelled for credit or other reasons.

The Tax Court held that Hathaway was an independent contractor in 1989 and 1990 and had the right to use Form 1040 Schedule C; he would not, however, be subject to unemployment taxes because of the amounts already paid by TAG.

The court reasoned that a taxpayer's independent contractor or common law employee designation is a question of fact which must be determined in accord with the nine criteria already mentioned. The opinion is remarkable for explicitly indicating which of the criteria argue for independent contractor or common law employee status.

TAG's *degree of control* over Hathaway was indicated as the single most important factor in determining Hathaway's independent contractor status. The court had to consider not only what actual control was exercised but what right of control practically existed. The court concluded that TAG did not control, nor have the right to control, Hathaway's actions: means or results of solicited sales; sales training; sales leads or sales reports. The statements in the sales procedure manual were "toothless"²⁰ as none of the procedures described in it were ever enforced, except for certain requirements about the placing and cancellation of orders. The TAG national sales manager supervision requirement, furthermore, was so limited and rare as to be inconsequential: it came into effect only when a special sales negotiation occurred with major companies. The court also rejected TAG's contention that the assignment of exclusive sales territories amounted to control as far as the sales activity itself was concerned.

The other criteria received a briefer treatment. The *perception of the parties*, gleaned from the evidence of Tax Court testimony indicated that Hathaway and sometimes TAG itself

considered Hathaway as an independent contractor or independent agent. But this testimony is contradicted by the fact that Hathaway used Form 1040 Schedule A for many years and that TAG issued Forms W-2 and withheld taxes from his commissions. The court concluded that the bulk of the evidence points to the perception that the parties considered themselves as in an employer-employee relationship. The *work facilities and sales materials and equipment investments* were so substantial, relative to TAG's reimbursement, that the court had no difficulty in reaching the conclusion that this criterion indicated Hathaway's independent contractor status. As already indicated in the factual description of his work, Hathaway's individual *opportunities for profit or loss* included non-reimbursement for order losses from merchandise which could not be shipped and losses from guaranteeing the credit of a customer who failed to pay. The evidence once again indicated that Hathaway could claim independent contractor status. TAG did provide a pension plan, disability, life and medical insurance *benefits*. Such provisions support a conclusion that Hathaway was an employee. The court never explicitly dealt with the *payment by job or by time* criterion, but it is quite obvious from the facts that Hathaway received commissions from sales jobs completed rather than from time spent in negotiating those sales – a factor that would indicate independent contractor rather than common law employee status. The court did observe that Hathaway's activity is certainly an *integral or regular part of TAG's regular business activity*; this factor, the court concluded, would again support a determination of Hathaway's status as an employee. Since Hathaway had worked for TAG since 1969, the *permanency of his relationship* with TAG would indicate his employee status. The court finally observed that TAG's *power to discharge* Hathaway and Hathaway's right to leave TAG's employment created an employment at will. TAG's right, however, does not clearly indicate employee status because, from the context,

TAG would probably have the same right to discharge an independent contractor. This criterion, then, has little impact upon a determination of status.

The current analysis of the Hathaway case, then, indicates that four criteria (control, investment, profit/loss, and job/time) argued for independent contractor status and four criteria (perception, benefits, regular business, and permanency) supported common law employee status. The power to discharge criterion was deemed inconclusive by the court.²¹

CONCLUSION: A PLAN OF ACTION

The Internal Revenue Code, IRS publications and the four decisions described above will enable the tax practitioner to plan procedures for the practitioner's benefit and for the benefit of the tax client.

The tax practitioner will receive benefit from acquaintance with code provisions concerning the additions and penalties for late and inaccurate returns; from IRS publications including Publication 15-A concerning the criteria used to determine the elements and examples of independent contractors, common law employees, statutory employees and statutory non-employees; from the Tax Court decisions which richly describe the application of the nine criteria to a number of professions including accountants, instructors and traveling sales representatives.

Tax clients, including business consultants or advisors, will receive benefit from tax professional software and other means of communication which assist them to adequately judge the need for professional counsel; to keep work records by way of computer and other media in day-to-day journals of business activity; to apply the nine criteria properly, especially

in questions of control, perceptions of the parties by way of written agreement and issuance of W-2 forms, and potential for profit and loss.

ENDNOTES

¹ IRC Section 62(a)(2); Section 63(a),(d); Section 67(a),(b); Section 162(a).

² IRC Section 55(a). The alternative minimum tax requires that corporations and individuals pay a certain minimum which would include the greater amount of the regular tax of the tentative minimum tax at 26% of the first \$175,000 and 28% on all taxable excess. Section 56(b)(1)(A) provides that in computing Alternative Minimum Taxable Income, no deduction will be allowed for miscellaneous itemized deductions.

³ IRC Section 3121(d)(1),(3) defines a statutory employee as any (1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or (3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person (A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal; (B) as a full-time salesman; (C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or (D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations; if the contract of service contemplates that substantially all of such services are to be performed personally by such individual.

⁴ *Daniel Feaster v Commissioner*, TC Memo 2010-157, 2010 Tax Ct. Memo LEXIS 194. Feaster argued that he was an independent contractor whose self employment tax has been paid by the business for whom he provided auditing services.

⁵ IRS website at www.irs.gov Even common law employees may itemize job travel expenses for travel from home to a site other than the employee's usual place of business.

⁶ IRS Publication 15-A – Employer's Supplemental Tax Guide, p.5.

⁷ *Thomas Rosato, et ux. v. Commissioner*, TC Memo 2010-39, 2010 Tax Ct. Memo LEXIS 40, for a treatment of the common law employee definition; this treatment appears in many Tax Court and other cases treating the employee status.

⁸ IRS Publication 15-A – Employer's Supplemental Tax Guide, pp.7, 8; *Weber v. Commissioner*, 103 T.C. 378 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995).

⁹ *Donald T. Robinson, et ux. v. Commissioner*, TC Memo 2011-99, 2011 Tax Ct. Memo LEXIS 97; 1 Restatement of Agency, 220 (1958).

¹⁰ IRS Publication 15-A – Employer's Supplemental Tax Guide, p.6.

¹¹ TC Memo 2010-39.

¹² *Thomas Rosato, et ux. v. Commissioner*, 2010 Tax Ct. Memo LEXIS 40 at 9-10. An individual qualifies as a statutory employee under section 3121(d)(3) only if the individual is not a common law employee pursuant to section 3121(d)(2). Section 3121(d) defines "employee", in pertinent part, as follows:

- (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee; or
- (3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—
 - (D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this

paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed;

¹³ TC Memo 2010-157.

¹⁴ TC Memo 2011-99.

¹⁵ *Paul E. Hathaway, et ux. v. Commissioner*, TC Memo 1996-389, 1996 Tax Ct. Memo LEXIS 409

¹⁶ The *Robinson* decision concerns the income tax status of both Robinson and his wife, but this article concentrates upon Robinson because the Tax Court did find that Robinson was an independent contractor, whereas his wife was held to be a common law employee. Since this article has already examined two decisions which determined that the taxpayer was a common law employee, the portion of the *Robinson* opinion dealing with Robinson's marketing company manager wife is omitted.

¹⁷ *Reece v. Commissioner*, TC Memo 1992-335, 1992 Tax Ct. Memo LEXIS 358, where a full time university professor (a common law employee for his full time work) acted as a seminar instructor for an executive education program. For this work, Reece was held to be an independent contractor because he designed, led and taught the non-credit program, even though the program occurred in classrooms supplied by the university.

¹⁸ 2011 Tax Ct. Memo LEXIS 97 at 42-43.

¹⁹ TC Memo 1996-389.

²⁰ 1996 Tax Ct. Memo LEXIS 409 at 23.

²¹ The *Hathaway* Tax Court, in endnote 7, noted that the Service requested that benefits provided by TAG to Hathaway should be taxable as income to him if the court determined that Hathaway was an independent contractor; this contention however, was not properly pleaded and was not considered by the court.