

The Burger Court Opinion Writing Database

Commissioner v. Kowalski

434 U.S. 77 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

RECEIVED
CLERKS OF THE
CHIEF JUSTICE

October 19, 1977 OCT 19 PM 5 27

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Chief:

Unless you wish to do so, I shall be glad to attempt a brief dissent in the above case. I suppose that, actually, it wouldn't be a great disaster if the opinion were a unanimous one.

Sincerely,

H.A.B.

The Chief Justice

Harry
I agree on both aspects.
Proceed
WJB

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 22, 1977

Dear Harry:

Re: 76-1095 Commissioner of Internal Revenue v. Kowalski

Please join me in your dissent.

Regards,

WRN

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice ✓
 Mr. Justice Stewart ✓
 Mr. Justice White ✓
 ✓ Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Circulated: 11/9

No. 76-1095

Recirculated: _____

Commissioner of Internal Revenue,	} On Writ of Certiorari to	
Petitioner,		the United States
v.		Court of Appeals for
Robert J. Kowalski et ux.	} the Third Circuit.	

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court,

This case presents the question whether cash payments to state-police troopers, designated as meal allowances, are included in gross income under § 61 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61 (a),¹ and, if so, are otherwise excludable under § 119 of the Code, *id.*, § 119.²

I

The pertinent facts are not in dispute. Respondent³ is a state-police trooper employed by the Division of State Police

¹ "§ 61. Gross income defined.

"(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

"(1) Compensation for services, including fees, commissions, and similar items"

² "§ 119. Meals or lodging furnished for the convenience of the employer.

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer, but only if—

"(1) in the case of meals, the meals are furnished on the business premises of the employer

"In determining whether meals . . . are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation."

³ References to "respondent" are to Robert J. Kowalski. Nancy A.

STYLISTIC CHANGES

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 11-9-77

Recirculated: 11-10-77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1095

Commissioner of Internal Revenue,	On Writ of Certiorari to
Petitioner,	
v.	
Robert J. Kowalski et ux.	
	the United States
	Court of Appeals for
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STYLISTIC CHANGES

ReORGANIZATION 6-7, 12-13

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 10/1/77

Recirculated: 10/1/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1095

Commissioner of Internal Revenue,	} On Writ of Certiorari to
Petitioner,	
v.	
Robert J. Kowalski et ux.	the United States Court of Appeals for the Third Circuit.

[November —, 1977]

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76-1095

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

Harry,

This will need a little
more work but I hope it will
give you what you need

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 29 , 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-1095, Commissioner v. Kowalski

Two cases are held for the Kowalski opinion.

No. 76-1243, United States v. Smith

This is a refund suit filed by the taxpayers to recover amounts claimed as taxes with respect to cash meal payments paid to Mississippi Highway Safety Patrol officers.

The subsistence payments involved here are quite different in character than those in Kowalski. Here, the trooper must file a voucher and swear that the reimbursement claimed represents an amount actually spent on lunch. In addition, troopers are apparently required to eat in designated restaurants. Finally, the amount of the allowance is limited to \$5 and no money is received by the trooper for days when he is off duty.

OC 177
Wm Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 10, 1977

Re: No. 76-1095, Commissioner v. Kowalski

Dear Bill,

I am glad to join your opinion for the
Court in this case.

Sincerely yours,

PS.
/

Mr. Justice Brennan

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 11, 1977

Re: No. 76-1095 - CIR v. Kowalski

Dear Bill:

I agree.

Sincerely,



Mr. Justice Brennan

Copies to Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 10, 1977

Re: No. 76-1095, Commissioner of Internal Revenue v. Kowalski

Dear Bill:

Please join me.

Sincerely,

TM
T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

RECEIVED
CLERK OF THE
SUPREME COURT

October 19, 1977 OCT 19 PM 5 27

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The Chief Justice

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Proceed
W.R.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 10, 1977

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Bill:

I shall try my hand at a short dissent, and promise that I'll do my best to complete it by tomorrow. Unfortunately, because Friday will be a long conference day, I may not be able to do this. In that case, although I am embarrassed about it, may I ask that you be patient until I can get something done about it upon my return.

Sincerely,



Mr. Justice Brennan

OC 977
Wm Brennan

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

Circulated: 11/15/77

No. 76-1095

Recirculated: _____

Commissioner of Internal Revenue,	}	On Writ of Certiorari to
Petitioner,		the United States
v.		Court of Appeals for
Robert J. Kowalski et ux.		the Third Circuit.

[November —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

More than a decade ago the United States Court of Appeals for the Eighth Circuit, in *United States v. Morelan*, 356 F. 2d 199 (1966), held that the \$3 per day subsistence allowance paid Minnesota state highway patrolmen was excludable from gross income under § 119 of the Internal Revenue Code of 1954, 26 U. S. C. § 119. It held, alternatively, that if the allowance were includable in gross income, it was deductible as an ordinary and necessary meal-cost trade or business expense under § 162 (a)(2) of the Code, 26 U. S. C. § 162 (a)(2). I sat as a Circuit Judge on that case. I was happy to join Chief Judge Vogel's opinion because I then felt, and still do, that it was correct on both grounds. Certainly, despite the usual persistent Government opposition in as many Courts of Appeals as were available, the ruling was in line with other authority at the appellate level at that time.* Two cases, *Magness v. Commissioner*, 247 F. 2d 740 (CA5 1957), cert. denied, 355 U. S. 931 (1958), and *Hyslope v. Commissioner*, 21 T. C. 131 (1953), were distinguished. 356 F. 2d, at 207.

On December 11, 1967, however, this Court by a 5-3 vote decided *United States v. Correll*, 389 U. S. 299, restricting to

**Saunders v. Commissioner*, 215 F. 2d 768 (CA3 1954); *United States v. Barrett*, 321 F. 2d 911 (CA5 1963); *Hanson v. Commissioner*, 298 F. 2d 391 (CA8 1962). As in *Morelan*, certiorari apparently was not sought in any of this line of cases up to that time.

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota

November 21, 1977

Re: No. 76-1095 - Commissioner v. Kowalski

Dear Bill:

Please do not let my absence prevent bringing this case down when all the votes are in. There is no reason to hold it up for Central Illinois.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 14, 1977

No. 76-1095 Commissioner v. Kowalski

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

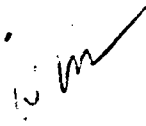
November 22, 1977

Re: No. 76-1095 - CIR v. Kowalski

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 10, 1977

Re: 76-1095 - CIR v. Kowalski

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

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