Rowan Companies v. United States: Of rigs—and ships—and employment tax— Of I.R.S. rulings— And why a meal is not a wage— And whether letters are kings

In *Rowan Companies v. United States*,[1] the Supreme Court held that meals and lodging provided to employees for the convenience of the employer do not constitute "wages" for the purpose of social security (F.I.C.A.) and unemployment insurance (F.U.T.A.) taxes.[2] Striking down the Internal Revenue Service's long-standing facilities-or-privileges regulations,[3] the Court based its decision on the duty of the Commissioner of Internal Revenue to act consistently with statutory authority and in a reasonable manner[4] and used several I.R.S. private letter rulings as evidence of inconsistency.[5]

Petitioner Rowan, an owner and operator of oil and gas rigs, provided meals and lodging to its offshore rig employees on ships moored to the rigs. Rowan transported its employees to the rigs for a ten day tour of duty and then transported them back to the mainland for five days of leave. This practice, which was more convenient than providing daily transportation to and from the mainland, saved Rowan nineteen dollars a day per employee.[6] The employees were required to accept the lodging as a condition of employment[7] and were not reimbursed if they did not eat the meals. Rowan provided identical meals and lodging to all offshore employees, but did not provide any meals or lodging to onshore employees or to offshore employees on leave.[8] Provision of these meals and lodging was not required by contract.[9]

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1. 452 U.S. 247 (1981).
2. *Id.* at 263.
3. Treas. Regs. §§ 31.3121(a)-1(f), .3306(b)-1(f) (1956).
4. 452 U.S. at 263.
5. *Id.* at 261 n.17.
6. *Id.* at 248 & n.1.
7. *Id.* at 251.
8. *Id.* at 249.
9. By the time the case reached the Supreme Court, the I.R.S. had abandoned its position that "Rowan furnished these services under an implied contract." Rowan Cos. v. United States, 624 F.2d 701, 702 & n.1 (5th Cir. 1980).

When computing its employees' wages for tax purposes, Rowan did not include the value of the meals and lodging. The I.R.S. assessed a deficiency for F.I.C.A. and F.U.T.A., but not for income tax withholding.[10] Rowan paid the deficiency, sued for a refund,[11] and moved for summary judgment.[12] The United States District Court for the Southern District of Texas granted respondent Government's cross motion for summary judgment[13] and Rowan appealed. The United States Court of Appeals for the Fifth Circuit affirmed the lower court and concluded that semantic inconsistency in the I.R.S.' definitions of wages for F.I.C.A., F.U.T.A., and income tax withholding was not fatal.[14] On certiorari, the Supreme Court reversed and found that the facilities-or-privileges regulations were invalid since they failed "to implement the statutory definition of 'wages' in a consistent or reasonable manner" as intended by Congress.[15] The Court cited, *inter alia*, five private letter rulings as evidence that the I.R.S. had been inconsistent in its treatment of F.I.C.A. and F.U.T.A. wages.[16]

Four employment taxes bear on the present case: the employee's withheld income tax,[17] the employee's withheld share of social security tax,[18] the employer's share of social security tax,[19] and the employer's unemployment insurance tax.[20] The first two are both income

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10. The I.R.S. did not dispute Rowan's contention that the meals and lodging were furnished for Rowan's convenience. 624 F.2d at 703.

11. 452 U.S. at 249-50. Suit was brought under 28 U.S.C. § 1346(a)(1) (1976).

12. *See* Petitioner's Petition for Certiorari at 13a.

13. *Id.*

14. 624 F.2d at 705-06.

15. 452 U.S. at 263.

16. *Id.* at 261 n.17.

17. Collection of Income Tax at Source on Wages, I.R.C. ch. 24 (originally enacted as Victory Tax Act of 1942, ch. 619, § 172, 56 Stat. 884; amended and reenacted as Current Tax Payment Act of 1943, ch. 120, § 2, 57 Stat. 126). "[E]very employer making payment of wages shall deduct and withhold upon such wages a tax." I.R.C. § 3402(a). This tax provides funding for general governmental expenditures. 624 F.2d at 706.

18. Federal Insurance Contributions Act, I.R.C. ch. 21 (originally enacted as Social Security Act of 1935, ch. 531, tit. VIII, 49 Stat. 620, 636; amended and reenacted as Int. Rev. Code of 1939, ch. 9, subchs. A, B, 53 Stat. 175). "[T]here is hereby imposed on the income of every individual a tax equal to the following percentages of wages." I.R.C. § 3101(a)-(b). "The tax imposed by section 3101 shall be collected by the employer of the taxpayer." I.R.C. § 3102(a). This tax provides funding for the old-age, survivors, and disability insurance and medicare programs. I.R.C. § 3101(a)-(b).

19. Federal Insurance Contributions Act, I.R.C. ch. 21. "[T]here is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of wages . . . paid by him with respect to employment." I.R.C. § 3111. This tax provides funding for the old-age, survivors, and disability insurance and medicare programs. I.R.C. § 3111(a)-(b).

20. Federal Unemployment Tax Act, I.R.C. ch. 23 (originally enacted as Social Security Act of 1935, ch. 531, tit. IX, 49 Stat. 620, 639; amended and reenacted as Int. Rev. Code of 1939, ch. 9, subch. C, 53 Stat. 175, 183). "There is hereby imposed on every employer . . . an

taxes[21] and withholding taxes,[22] for which the employee is primarily liable and the employer only secondarily liable,[23] whereas the last two are excise taxes, not withholding taxes.[24] The employer is primarily liable for the last two taxes; the employee has no liability.[25] All four taxes are imposed upon wages,[26] which is defined for F.I.C.A. and F.U.T.A. as "all remuneration *for employment*, including the cash value of all remuneration paid in any medium other than cash,"[27] and for withheld income tax as "all remuneration . . . *for services performed by an employee for his employer*, including the cash value of all remuneration paid in any medium other than cash."[28] For present purposes, these slightly variant wordings of the definitions of wages are "substantially identical."[29]

The statutes under consideration did not give the Commissioner express authority to issue regulations with legislative force.[30] In 1936, however, the Commissioner began issuing regulations that interpreted these statutory definitions of wages under his general interpretive authority.[31] One of the Commissioner's two original, contemporaneous regulations held that wages for F.U.T.A. did not include "facilities or privileges . . . furnished by the employer merely as a convenience to the employer,"[32] while a similar regulation provided the same effect for F.I.C.A.[33] These regulations merely acknowledged that the long-standing convenience-of-the-employer rule,[34] which had developed under income tax law, applied

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excise tax, with respect to having individuals in his employ, equal to [certain percentages] of the total wages . . . paid by him . . . with respect to employment." I.R.C. § 3301. This tax provides funding for the joint federal-state unemployment insurance program. 452 U.S. at 249 n.2.

21. *See* I.R.C. §§ 3101, 3402(a).

22. *See* I.R.C. §§ 3102(a), 3402(a).

23. *See* I.R.C. §§ 1, 3101(a)-(b), 3102(a), 3402(a).

24. *See* I.R.C. §§ 3111, 3301.

25. *See id.*

26. I.R.C. §§ 3101(a)-(b), 3111, 3301, 3402(a). Wages has been the base for computing these taxes since the original enactments. *See* 49 Stat. at 637, 639; 56 Stat. at 888.

27. I.R.C. §§ 3121(a), 3306(b) (emphasis added). The quoted definition is identical to the original 1935 definitions. *See* 49 Stat. at 639, 642. The 1939 Code did not alter these definitions of wages. *See* 53 Stat. at 177, 187.

28. I.R.C. § 3401(a) (emphasis added). The quoted definition is identical to the original 1942 definition. *See* 56 Stat. at 887.

29. 452 U.S. at 249 & n.4.

30. *See* I.R.C. ch. 21, 23, 24; I.R.C. § 7805(a).

31. "[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title." I.R.C. § 7805(a).

32. Treas. Regs. 90, Art. 207 (1936).

33. Treas. Regs. 91, Art. 14 (1936), *construed in* S.S.T. 302, 1938-1 C.B. 456, 457.

34. I.R.C. § 119(a) provides, in pertinent part:

> "There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him . . . by . . . his employer for the convenience of the

to the new F.I.C.A. and F.U.T.A. taxes as well.[35] Under these regulations, the I.R.S. approved convenience-of-the-employer exclusions from wages for supper money for employees who worked overtime,[36] and for free lunches in a company lunchroom.[37]

In 1940, the Commissioner changed his position. Without explanation,[38] he issued new regulations that included benefits furnished for the convenience of the employer as part of F.I.C.A. and F.U.T.A. wages.[39] These regulations were "virtually identical"[40] to the facilities-or-privileges regulations at issue in the present case.[41] Under these new regulations, the I.R.S. ruled that a steamship crew's meals and lodging were wages for F.I.C.A. and F.U.T.A.[42] Nevertheless, the I.R.S.' 1938 lunchroom ruling[43] remained in effect generally until 1957[44] and for nonrestaurant employees until 1962.[45] Again, there has been no explanation of these contrary I.R.S. positions, which continued in effect until well after the enactment of the 1954 Code.[46]

The premise upon which the facilities-or-privileges regulations rested was that employer-provided benefits were noncompensatory, and hence not wages, provided that their value was not appreciable in relation to total remuneration.[47] While purporting to substitute a test of appreciable-

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employer, . . . if . . . the meals are furnished on the [employer's] business premises . . . or [if] the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

Before the 1954 enactment of section 119, earlier uncodified versions of the convenience-of-the-employer rule had allowed exclusions for a wider variety of in-kind benefits of a noncompensatory character. *See generally* Commissioner v. Kowalski, 434 U.S. 77, 84-95 (1977).

35. 452 U.S. at 257-58; Commissioner v. Kowalski, 434 U.S. 77, 84 (1977).

36. S.S.T. 110, 1937-1 C.B. 440, 441.

37. S.S.T. 302, *supra* note 33, at 456-57.

38. The statutory definition of wages for F.I.C.A. and F.U.T.A. had not changed. *See* note 27 *supra*. Several years later, the Commissioner said that it was "immaterial, for the purposes of [F.I.C.A. and F.U.T.A.] taxes, whether the quarters or meals are furnished for the convenience of the employer." Mimeograph 5657, 1944 C.B. 550, 551. *See* 452 U.S. at 261 n.16.

39. Treas. Regs. 106, § 402.227 (F.I.C.A.) & 107, § 403.227 (F.U.T.A.) (1940).

40. 452 U.S. at 259-60.

41. Treas. Regs. §§ 31.3121(a)-1(f), .3306(b)-1(f) (1956).

42. S.S.T. 386, 1940-1 C.B. 211.

43. S.S.T. 302, *supra* note 33.

44. Rev. Rul. 57-471, 1957-2 C.B. 630, 632.

45. *Id*; Rev. Rul. 62-150, 1962-2 C.B. 213.

46. 452 U.S. at 260-61.

47. Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term 'facilities or privileges',

ness for the convenience-of-the-employer test, the I.R.S. continued to base private letter rulings on the 1938 lunchroom ruling for years after the 1954 Code was enacted.[48] Thus, in 1954, teachers' meals provided for the convenience of the employer were not F.I.C.A. wages,[49] while employees' meals and lodging furnished under an employment contract were.[50] In 1955, the I.R.S. excluded lunches provided to restaurant employees from F.I.C.A. and F.U.T.A. wages,[51] but, two years later, on almost identical facts, went the other way.[52] Then, in 1965, the I.R.S. ruled that a 1953 private letter ruling, which excluded from F.I.C.A. and F.U.T.A. wages free meals served to restaurant employees, had been revoked by the 1957 ruling that revoked the 1938 lunchroom ruling for restaurant employees.[53] Thus, the 1965 private letter ruling confirmed that the 1938

> however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

Treas. Regs. §§ 31.3121(a)-1(f), .3306(b)-1(f) (1956).

48. 452 U.S. at 261 n.17.

49. "S.S.T. 302 is applicable to the instant case. . . . S.S.T. 302 should be followed . . . with caution since . . . the value of meals generally is considered as additional wages under the Federal Insurance Contributions Act." Private Ruling 5401062910A.

50. S.S.T. 302 [is] based on the premises that the lunches were of relatively small value and were furnished merely as a means of promoting the health, good will, contentment, or efficiency of the employees.

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> . . . [G]enerally . . . the value of meals [is wages for F.I.C.A.] (1) where more than one meal a day is furnished to an employee, or (2) where the furnishing of a meal is a part of the [employment] contract . . . , or (3) where there is a wage differential between an employee who is furnished with a meal a day and one who is not so furnished, such differential [being] attributed to the meal.
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> . . . [M]imeograph 5657 . . . was promulgated primarily to point out that the "convenience of the employer" rule contained in the . . . income tax withholding [regulations] was not contained in the [F.I.C.A. and F.U.T.A.] regulations . . . and that such rule has no application [under F.I.C.A. and F.U.T.A.].

Private Ruling 5403042970A.

51. "S.S.T. 302 is equally applicable in the instant case." Private Ruling 5501244180A. *But see* Treas. Regs. 106, § 402.277 & 107, § 403.227 (1940)(referring specifically to restaurant employees).

52. In view of [the] well-established custom in the restaurant industry [of providing free meals to employees], . . . the furnishing of such meals must be recognized as a part of the general understanding of the parties to the employment contract, and . . . the value of such meals is generally [to be] regarded as part of the employee's total remuneration, i.e., the value of such meals is an appreciable part of the employee's total wage structure.

Private Ruling 5710044200A. *Accord*, Rev. Rul. 57-471, 1957-2 C.B. 630, 632.

53. "Since a ruling to a taxpayer may be revoked by a Revenue Ruling, we conclude that the [1953] ruling . . . was revoked by Rev. Rul. 57-471." Private Ruling 6507023460A.

lunchroom ruling had remained fully effective for nonrestaurant employees until its revocation in 1962.[54]

In the case at bar,[55] the Fifth Circuit based its affirmance of the lower court's ruling for the Government on several factors. First, the court said that treating meals and lodging as F.I.C.A. and F.U.T.A. wages was permissible "[a]bsent some indication of a different congressional intention,"[56] and cited cases that had upheld the 1940 regulations and the 1962 ruling that finally revoked the 1938 lunchroom ruling.[57] Second, since there was no point in withholding taxes that were not due, it was permissible not to withhold on wages that were not taxable as income under the convenience-of-the-employer rule, while at the same time withholding for F.I.C.A. and F.U.T.A. on the same wages, which were taxable for F.I.C.A. and F.U.T.A. under the appreciableness test.[58] Third, the early development of a broad convenience-of-the-employer rule, the placement in the

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54. *See* Private Ruling 6507023460A.

> S.S.T. 302 was not controlling in its case after the issuance of Rev. Rul. 57-471.
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> . . . Rev. Rul. 57-471 constituted constructive notice of our position to all establishments engaged in the preparation and serving of food to customers . . . that had received rulings [under S.S.T. 302] containing a contrary holding regarding the status of the value of meals.

Id.

55. Rowan Cos. v. United States, 624 F.2d 701 (5th Cir. 1980), *surveyed in* Woodward, *Federal Taxation, 1980 Fifth Circuit Survey*, 32 MERCER L. REV. 1057, 1082 (1981).

56. 624 F.2d at 704.

57. *Id.* The court cited Pacific Am. Fisheries, Inc. v. United States, 138 F.2d 464 (9th Cir. 1943), as having approved the 1940 regulations. That case, however, concerned meals and lodging furnished under an employment contract to imported employees, but not to local employees. Although the facts of the *Fisheries* case were not similar to those in *Rowan*, the case was important as an early articulation of the notion "that what might not be taxable income for income tax purposes might constitute wages under the provisions of the Social Security Act." *Id.* at 465. This reasoning was based on the premise that income taxes supported general governmental expenses, while social security taxes benefitted the taxed employee. *Id.* The court also cited S.S. Kresge Co. v. United States, 218 F. Supp. 240 (E.D. Mich. 1963), as approval for the 1962 ruling. The court in *Kresge*, however, acknowledged that its facts (free meals given to restaurant employees as remuneration for availability for work during mealtimes) did not fall within the convenience-of-the-employer rule. "This Court concludes that even if the 'convenience of the employer' doctrine applies to F.I.C.A. and F.U.T.A. taxes, the facts of the case at bar clearly do not bring it within such rule." *Id.* at 244. *Accord*, S.S. Kresge Co. v. United States, 379 F.2d 309 (6th Cir. 1967). For a recent ruling that agreed with the Fifth Circuit in *Rowan* and with the *Fisheries* and *Kresge* cases, see Beau Rivage Restaurant, Inc. v. United States, 511 F. Supp. 73 (S.D.N.Y. 1980).

58. *See* 624 F.2d at 704. The court's argument was circular at best since the issue was not whether the wages were taxable under any particular statute, which assumed the correctness of the I.R.S.' interpretation of the statutes, but whether wages might be interpreted differently from statute to statute. Additionally, the court confused the withholding and excise functions of the taxes. *See* text accompanying notes 22 and 24 *supra*.

income tax sections of the 1954 Code of the narrower[59] convenience-of-the-employer rule, and the Commissioner's rulings under the 1954 Code showed that the convenience-of-the-employer rule did not apply to F.I.C.A. and F.U.T.A.[60] Fourth, semantic consistency in interpreting the statutes was not mandatory since the proper inquiry was "whether the construction reached by the Secretary is a permissible one."[61]

The last factor was the core of the Fifth Circuit's opinion. The court rejected the "pragmatic approach"[62] of three recent appellate cases from other federal jurisdictions[63] on the ground that semantic consistency was not essential to a regulation's validity:

> We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike, but in deciding to what extent Congress purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. This conclusion must be influenced by the purposes of the statutes, the uses made of their revenues and their relationship with other statutes.[64]

Crucial to the Fifth Circuit's holding in *Rowan* was its treatment of the recent Supreme Court decision in *Central Illinois Public Service Co. v. United States*.[65] In *Central Illinois*, the Court reasoned that since the

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59. Narrowing the convenience-of-the-employer rule to meals and lodging furnished in specific circumstances, *see* note 34 *supra*, did not resolve exclusions for all benefits. *See* Commissioner v. Kowalski, 434 U.S. 77 (1977). *See generally* 10 LOY. CHI. L.J. 789 (1979).

60. *See* 624 F.2d at 705.

61. *Id.* at 705-06.

62. *Id.* at 707.

63. In Royster Co. v. United States, 479 F.2d 387 (4th Cir. 1973), the court held that meal reimbursements were not F.I.C.A. and F.U.T.A. wages since they were "not attributable to any service [performed for the employer] on the part of the employee," *id.* at 391, and noted that "the term wages is narrower than the term income." *Id.* at 390; *see* 10 WAKE FOREST L. REV. 651 (1974). For an argument in favor of a broad definition of wages, see 29 BAYLOR L. REV. 145 (1977). In Hotel Conquistador, Inc. v. United States, 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1032 (1980), the court concluded that the facilities-or-privileges regulations were worthless to employers as aids in tax planning and held that free meals were not F.I.C.A. and F.U.T.A. wages. *Id.* at 1354. The Fifth Circuit in *Rowan* devoted more space to reprinting an I.R.S. ruling disavowing *Hotel Conquistador* than to any real analysis of the Court of Claims' opinion. *See* 624 F.2d at 707 & n.11. In Oscar Mayer & Co. v. United States, 623 F.2d 1223 (7th Cir. 1980), the court excluded from F.I.C.A. and F.U.T.A. wages the difference between the actual cost of meals served to employees and the charges assessed because "Congress' use of the term 'wages' in both contexts reflects an intent that the term be construed for FICA and FUTA purposes congruently with the manner [prescribed] for the income tax provisions." *Id.* at 1227.

64. 624 F.2d at 705-06. The court also raised the possibility that the I.R.S.' later interpretations of wages for income tax withholding might be the proper inconsistency to investigate, rather than the earlier interpretations for F.I.C.A. and F.U.T.A. *Id.* at 705.

65. 435 U.S. 21 (1978). The case concerned only the definition of wages for income tax withholding. "The income tax issue is not before us in this case. We are confronted here,

employer's liability for its employees' income taxes was secondary, "the employer's obligation to withhold [must] be precise and not speculative."[66] The income tax withholding provisions' legislative history, which indicated a major concern for "simplicity and ease of administration,"[67] convinced the Court that the definition of income in the income tax section of the Code[68] was much broader than the definition of wages in the withholding section.[69] Thus, although Central Illinois' employees would ultimately be liable for income tax, the company was not required to withhold.[70]

In *Rowan*, the Fifth Circuit declined to follow *Central Illinois* because *Central Illinois* concerned the retroactive imposition of withholding tax, whereas *Rowan* dealt with the prospective effect of withholding regulations.[71] The court concluded that Congress had, in effect, approved the facilities-or-privileges regulations[72] and that the regulations did not ham-

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instead, with the question whether the lunch reimbursements, even though now they may be held to constitute taxable income to the employees who are reimbursed, are or are not 'wages' subject to withholding." *Id.* at 24; *see* Kovey, *Impact of Supreme Court Decision Limiting Withholding on Employees' Meal Allowances*, 48 J. TAX. 276 (1978). *See also* 29 ME. L. REV. 401 (1978). For a discussion of the income taxability of meal reimbursements, see Commissioner v. Kowalski, 434 U.S. 77, 82-96 (1977).

66. 435 U.S. at 31. In a concurring opinion, Mr. Justice Brennan stressed the lack of "any evidence of congressional intent to make employers guarantors of the tax liabilities of their employees, which would in all likelihood be the result if withholding taxes can be assessed retroactively." *Id.* at 33, 34 (Brennan, J., concurring). The Court of Claims in Hotel Conquistador, Inc. v. United States, 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1032 (1980), relied on the logic of the majority in *Central Illinois*. *See* 597 F.2d at 1354.

67. 435 U.S. at 30 (quoting S. Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942)). The House of Representatives had wanted to require withholding on dividends and on interest from bonds, *see* H.R. Rep. No. 2333, 77th Cong., 2d Sess., 125 (1942), but the Senate limitation to wages was enacted. *See* S. Rep. No. 1631 at 165; 452 U.S. at 255-57 (discussing legislative history). The Court in *Central Illinois* characterized the standard adopted as "intentionally narrow and precise." 435 U.S. at 31.

68. *See* I.R.C. § 61(a).

69. 435 U.S. at 29-31; *see* I.R.C. § 3401(a).

70. The Court also rejected the idea that the overnight rule, I.R.C. § 162(a)(2), applied to income tax withholding. 435 U.S. at 30. For a discussion of the overnight rule, see United States v. Correll, 389 U.S. 299 (1967). Since the decision in *Central Illinois*, the I.R.S. has announced that employers must, nevertheless, include on employees' W-2 forms the value of fringe benefits that are taxable as income but not subject to withholding. Rev. Proc. 80-53, 1980-2 C.B. 848.

71. 624 F.2d at 706.

72. *Id.* at 706 & n.10. The court noted that, in 1978, Senator Long had been aware of the regulations. Yet, in response to Senator Dole's inquiry whether "to the extent the value of meals and lodging is excluded from gross income, such item also is excluded from the definition of 'wages' for the purpose of income tax withholding, social security (or FICA) tax, and unemployment (or FUTA) tax," Senator Long replied: "Yes. Due to the special circumstances which the bill addresses, an item excluded from gross income will also be excluded from the definition of 'wages' for all payroll tax purposes." 124 Cong. Rec. S, 12367 (daily

per ease of administration since "most businesses today utilize computers . . . and it is a simple matter to devise [an appropriate] program."[73]

When the Supreme Court reviewed the Fifth Circuit's decision in *Rowan*, it faced this very complex regulatory history and a split in the circuits.[74] Although the Government did not assert that meals and lodging were wages for income tax or income tax withholding,[75] it did contend that they were includible in F.I.C.A. and F.U.T.A. wages because of the facilities-or-privileges regulations.[76] The principal question, then, was whether the regulations were valid.[77]

Validity hinged upon whether the regulations "implement[ed] the congressional mandate in some reasonable manner,"[78] and whether the statutes and the regulations were harmonious.[79] The Court concluded that since the regulations at issue were interpretive in nature and the Commissioner's interpretations could be measured directly against Congress' definitions, less deference was required than to legislative regulations.[80] Specific considerations were whether the regulations were contemporaneous with the original statute, how later regulations evolved, whether the Commissioner was consistent in his interpretations, and how closely Congress looked at the regulations when it reenacted the original statute.[81] Mr. Justice Powell, writing for the majority, observed that Congress' consis-

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ed. Aug. 2, 1978), *quoted in* Brief for Petitioner, 452 U.S. 247 (1981), at 12 n.10.

73. 624 F.2d at 706-07. Rowan later pointed out that computers did not exist when wages was chosen as the base for calculating employment taxes. Brief for Petitioner at 36-37.

74. The Court specifically cited Oscar Mayer & Co. v. United States, 63 F.2d 1223 (7th Cir. 1980), and Hotel Conquistador, Inc. v. United States, 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1032 (1980), as the variants. 452 U.S. at 250 & n.7. The Court never mentioned Royster Co. v. United States, 479 F.2d 387 (4th Cir. 1973).

75. 452 U.S. at 250-51.

76. *Id.* at 251-52.

77. *See id.* at 252-53.

78. *Id.* (quoting United States v. Correll, 389 U.S. 299, 307 (1967)). *See* Commissioner v. Portland Cement Co., 450 U.S. 156, 169 (1981).

79. 452 U.S. at 253. *See* National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979).

80. *See* 452 U.S. at 253. There has been much confusion on the difference between legislative and interpretive regulations. The Fifth Circuit apparently thought that the facilities-or-privileges regulations were legislative. *See* 624 F.2d at 704. The Supreme Court urged comparison with Commissioner v. Portland Cement, 450 U.S. 156, 165 (1981)(regulations dispostive under express grant of authority); Fulman v. United States, 434 U.S. 528, 533 (1978)(regulations dispositive since Congress failed to provide necessary rule); Batterton v. Francis, 432 U.S. 416, 424-25 (1977)(regulations dispositive under express delegation of authority). 452 U.S. at 253. *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7:8-7:15 (2d ed. 1979).

81. 452 U.S. at 253 (citing National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)).

tency in defining wages similarly in the F.I.C.A., F.U.T.A., and income tax withholding statutes[82] was "strong evidence that Congress intended 'wages' to mean the same thing"[83] for the three statutes, that the choice of wages as the standard was a result of congressional concern for "simplicity and ease of administration,"[84] and that the legislative history supported these conclusions.[85]

Turning to the I.R.S.' various rulings under the statutes, the Court noted that the original, contemporaneous regulations, which were issued in 1936, approved the application of the convenience-of-the-employer rule to F.I.C.A. and F.U.T.A. wages, but also observed that the Commissioner's later regulations and rulings took a different tack.[86] Rejecting the Government's argument that the facilities-or-privileges regulations had become law when Congress passed the 1954 Code, the Court pointed out that the Commissioner's 1938 lunchroom ruling, which was based on the 1936 regulations that approved the convenience-of-the-employer rule, had remained in effect until 1962.[87] As further evidence of the inconsistency of the I.R.S.' interpretations of wages, the Court, on its own initiative,[88] cited five private letter rulings in a footnote.[89] The Court struck down the facilities-or-privileges regulations and held that they failed "to implement the statutory definition of 'wages' in a consistent or reasonable manner."[90] The Court observed that its reasoning was fully consistent with its holding in *Central Illinois*.[91] The three Justices in dissent merely said that the Fifth Circuit had been correct since the regulations were "a permissible interpretation."[92]

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82. *See* text accompanying notes 25 and 26 *supra*.

83. 452 U.S. at 255.

84. *Id.* (quoting S. Rep. No. 1631, *supra* note 67).

85. 452 U.S. at 255-57. Rejecting the Government's contention that F.I.C.A. and F.U.T.A. wages had to include a broader array of remuneration, the Court said that there was no reason to conclude that Congress did not intend the convenience-of-the-employer rule to apply to F.I.C.A. and F.U.T.A. *Id.* at 257-58.

86. *Id.* at 258-62.

87. *Id.* at 260-62.

88. *See* Kovey & Winslow, *Supreme Court's Citation of Letter Rulings: What Does It Mean to Practitioners?*, 55 J. TAX. 166 (1981).

89. "Although these rulings have no precedential force, . . . they are evidence that S.S.T. 302 did not merely lie dormant on the books after the Commissioner issued [the 1940 regulations]." 452 U.S. at 261 n.17. Private letter rulings do not receive as much internal review as revenue rulings. For this reason, the I.R.S. has long maintained that private letter rulings have no precedential value. Nevertheless, private letter rulings have been relied upon increasingly since 1976 to show the I.R.S.' interpretation of statutes, characterization of transactions, inconsistent treatment, and abuse of discretion. Kovey & Winslow, *supra* note 88, at 166-67.

90. 452 U.S. at 263.

91. *Id.*

92. *Id.* at 263 (Brennan, White, & Marshall, JJ., dissenting). Perhaps the dissenting

It was indeed a frabjous day when the Court thus took up its vorpal blade and slew the jabberwockian inconsistency of the I.R.S.' position on meals and lodging for F.I.C.A. and F.U.T.A. wages.[93] The opinion will be of considerable practical importance to practitioners and to companies that supply meals or lodging to employees for the companies' convenience. They should immediately review their F.I.C.A. and F.U.T.A. positions and consider actions for refund of past F.I.C.A. and F.U.T.A. taxes.[94]

Two important principles emerge from the Court's opinion. First, the I.R.S. must be consistent in its application of the law. On virtually identical arguments,[95] the Supreme Court held the opposite of the Fifth Circuit. Perhaps the Fifth Circuit ruled for the Commissioner in order to test on review the theory that the varying purposes of the statutes in question justified differing interpretations of a similar term, although the court's elaborate presentation of the issue tends to belie such a conclusion. A better view of the case is that the Fifth Circuit was more willing to defer to administrative interpretation, whereas the Supreme Court was more concerned with consistency in the face of statutory definition. The Court's ruling will cause the I.R.S. to be more careful in its approach to statutory interpretation. More importantly, it will provide practitioners with authority to attack I.R.S. interpretations that are inconsistent in their interpretation of identical terms defined by Congress in identical ways.[96] Second, the Supreme Court has now approved the citation of private letter rulings to show I.R.S. inconsistency. One subsequent case has cited *Rowan* as authority to use private letter rulings to show inconsistent treatment,[97] another has relied extensively on private letter rulings to show the I.R.S.' position on a particular doctrine,[98] and yet another has

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justices were confusing interpretive and legislative regulations. *See* note 80 *supra*.

93. *See* L. CARROLL (C. DODGSON), THROUGH THE LOOKING-GLASS 13-15 (Macmillan ed. 1963).

94. A cautionary note: "In light of *Rowan*, the IRS has announced that meals and lodging furnished to employees by employers, but not for the employer's convenience, are subject to FICA and FUTA taxes." [1982] STAND. FED. TAX REP. (CCH) ¶ 4934.1879 (citing I.R. News Rel. 81-104, Sept. 11, 1981). Procedures for claiming refunds are detailed in Rev. Proc. 81-69, 1981-52 I.R.B. 26 (also released as I.R. News Rel. 81-133 (Dec. 3, 1981)), *reprinted in* 1982 FED. TAXES (P-H) ¶ 54,709.

95. Telephone interview with K. Martin Worthy (counsel for petitioner in *Rowan*), Partner, Hamel, Park, McCabe & Saunders, Washington, D.C. (Jan. 6, 1982).

96. *Rowan* has indeed already been cited in this regard by the Fifth Circuit. Woodson v. Commissioner, 651 F.2d 1094, 1096 (5th Cir. 1981).

97. *See* Estate of Blackford v. Commissioner, 77 T.C. No. 90, TAX. CT. REP. (CCH) Dec. 38,477, at n.12 (1981).

98. *See* Xerox Corp. v. United States, 656 F.2d 659, 673-74 (1981). "Though private letter rulings have no precedential force, they are helpful, in general, in ascertaining the scope of the 'service' doctrine adopted by the Service and in showing that that doctrine has been

used private letter rulings "as evidence of . . . past administrative practice."[99] Further incursion into the precedential sanctity of private letter rulings may someday prompt the I.R.S. to ask Congress to forbid disclosure or even force the I.R.S. to increase dramatically its internal review.[100]

Now that the oyster's shell is cracked, perhaps one day it will open fully. Whatever *Rowan* portends for the future, there will be no dearth of litigation concerning I.R.S. inconsistency and private letter rulings.[101] As Tweedledee told Alice:

> And thick and fast they came at last,
> And more, and more, and more—
> All hopping through the frothy waves,
> And scrambling to the shore.[102]

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regularly considered and applied by IRS." *Id.* at 660 n.3. "[W]e have the right to consider the Service's rulings, both formal and informal, in light of the facts we have found on this record." *Id.* at 660.

99. Niles v. United States, 520 F. Supp. 808, 814 & n.2 (N.D. Cal. 1981).

100. Kovey & Winslow, *supra* note 88, at 167.

101. The decision in *Rowan* may already affect at least 19 pending cases, 622 audits, and 15,011 claims for refund. Kovey & Winslow, *Sup. Ct. in Rowan Holds "Wages" Excludable from Income Are Exempt from FICA, FUTA*, 55 J. TAX. 130 (1981) (citing Brief for Respondent at 1).

102. L. CARROLL, *supra* note 93, at 48.