

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 16538
[Redacted]	)	
Petitioners.	)	DECISION
	)	
	)	

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On March 6, 2002, the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (NODD) to [Redacted] (petitioners), proposing additional income tax and interest for the taxable years 1998, 1999, and 2000 in the total amount of \$7,983. The petitioners filed a timely protest and petition for redetermination. In the petitioners' petition for redetermination the petitioners' representative indicated that additional information would be submitted and requested a hearing before the Commission. However, when the Commission contacted the petitioners' representative in April of 2003, and asked the status of any additional information to be provided, the representative indicated that she has not talked with her clients in over a year. As of the date of this Decision, no hearing has been held or any additional information submitted. Therefore, the Commission, having reviewed the file, hereby issues its decision.

The Commission's Income Tax Audit Bureau (ITA) audited the petitioners' 1998 through 2000 income tax returns. As a result of the audit, ITA disallowed the petitioners' \$31,417, \$33,592, and \$26,450 sole proprietorship net loss as reported on federal Schedule C for tax years 1998, 1999, and 2000, respectively. It is ITA's contention that the majority of costs disallowed were not deductible since the husband's tax home was his work site thus the husband's travel costs to and from their Idaho residence to the husband's work locations were personal expenditures rather than deductible business expenditures. Additionally, ITA disallowed non-travel related Schedule C costs for lack of documentation.

**IN GENERAL**

For tax years 1998 through 2000, the husband's W-2's reflect the following:

**Tax Year 1998**

<b>Employer</b>	<b>Federal Form</b>	<b>Statutory Employee Boxed Checked</b>	<b>Federal With-holdings</b>	<b>State With-holdings</b>	<b>Federal Taxable Wages</b>	<b>Idaho Taxable Wages</b>	<b>Washington Wages</b>
[Redacted]	W-2	No	Yes	No	\$2,688		\$2,688
[Redacted]	W-2	No	Yes	Yes	\$8,570	\$1,000	
[Redacted]	W-2	No	Yes	No	\$2,707		\$2,707
[Redacted]	W-2	No	Yes	Yes	\$48,086	\$12,029	\$44,569

**Tax Year 1999**

<b>Employer</b>	<b>Federal Form</b>	<b>Statutory Employee Boxed Checked</b>	<b>Federal With-holdings</b>	<b>State With-holdings</b>	<b>Federal Taxable Wages</b>	<b>Idaho Wages</b>	<b>Washington Wages</b>
[Redacted]	W-2	No	Yes	No	\$1,924		\$1,924
[Redacted]	W-2	No	Yes	Yes	\$51,168	\$19,409	\$31,759
[Redacted]	W-2	No	Yes	No	\$5,546		\$5,546

**Tax Year 2000**

<b>Employer</b>	<b>Federal Form</b>	<b>Statutory Employee Boxed Checked</b>	<b>Federal With-holdings</b>	<b>State With-holdings</b>	<b>Federal Taxable Wages</b>	<b>Idaho Wages</b>	<b>Oregon Wages</b>
[Redacted]	W-2	No	Yes	Yes	\$38,355	\$38,355	
[Redacted]	W-2	No	Yes	Yes	\$10,298	\$1,377	\$8,921

In addition to the wages reported above, the husband received the following 1099's:

<b>Tax Year 1998</b>	<b>Federal Form</b>	<b>Description</b>
[Redacted]	1099-MISC	Nonemployee Compensation - \$5,070
<b>Tax Year 2000</b>		
[Redacted]	1099-MISC	Rents - \$2,898

The petitioners reported the husband's income from the federal W-2's as wages [Redacted]. The petitioners did not report the income from the 1099 they received for tax year 2000 on their return as originally filed, however, in March of 2001, the petitioners filed an amended Idaho income tax return for tax year 2000 to report the \$2,898 of income. It is not

entirely clear how the petitioner treated the income reflected on the 1099 for tax year 1998 when they filed their 1998 income tax return.

The petitioners reported the following activity of the husband on federal Schedule C as a loss from a telecommunications business:

	1998	1999	2000
Gross Receipts	\$6,870	\$0	\$0
Expenses:			
Car and Truck	(14,852)	(18,793)	(15,869)
Rent or Lease	(3,389)	0	0
Repairs and Maintenance	(2,163)	(1,574)	(1,252)
Supplies	(575)	(3,240)	(1,839)
Travel	(11,595)	(5,362)	(4,065)
Meals at 50%	(5,713)	(4,623)	(3,425)
Net Profit or (Loss)	<u>(\$31,417)</u>	<u>(\$33,592)</u>	<u>(\$26,450)</u>

As previously mentioned, ITA disallowed the petitioners' \$31,417, \$33,592, and \$26,450 sole proprietorship net loss as reported on federal Schedule C for tax years 1998, 1999, and 2000, respectively. ITA stated in the NODD page two explanation that:

A taxpayer who lives in an area outside his tax home cannot deduct the cost of travel between his tax home and his family home, or the cost of meals and lodging while at his tax home. You were not self-employed, as all of your income was from employer Form W-2's.

In a letter dated April 8, 2002, from the petitioners' initial representative, the representative stated that the husband:

Is a construction worker and should have been classed [sic] as a "statutory employee". He does travel to many towns and does not get a per diem for food or lodging. His job is a splicer (for telephone companys) and the income is from the w-2 form. This is not a hobby loss as you might have thought.

The representative further states that the husband

[s]eldom has a job where he lives. He is centralized in his location as the job covers the western states. He seldom has a job last over a week in any location and does have to cover his own expenses as stated in the contract. The employers do not pay for motels, meals or travel of any kind except for the two 1099's that were actually to reimburse travel expenses.

Lastly, it is the representative's belief that the expenses at-issue should have been reported by the petitioners on federal Form 2106 as employee business expenses rather than on Schedule C and that "they perhaps have "some" other schedule A items as well."

ITA allowed deductions in 1998 to the extent of the \$6,870 of gross receipts reported on federal Schedule C, which led the petitioners' representative to initially believe that ITA was applying what is commonly referred to as the "hobby loss provisions" found in Internal Revenue Code section 183. It is unclear why ITA was offsetting the \$6,870 of receipts with \$6,870 of expenses; however, the issue in this case does not appear to be a section 183 "activities not engaged in for profit" issue. The issue in this case is whether or not the petitioners are entitled to deduct any of the expenses the husband incurred as a splicer for the telephone industry under Internal Revenue Code section 162 and if deductible are the expenses allowed as a deduction in arriving at federal adjusted gross income or as a miscellaneous itemized deduction subject to the limitation found in Internal Revenue Code section 67.

In the representative's April 8, 2002, letter, the representative stated that the husband was a "statutory employee;" however, the representative goes on to state that "the expenses at-issue should have been reported by the petitioners on federal Form 2106 as employee business expenses rather than on Schedule C" which appears to be two different arguments.

## LAW AND ANALYSIS

### 1. Statutory Employee

A taxpayer can be treated as a statutory employee for certain employment tax purposes and remain an independent contractor for federal income tax purposes which would allow the taxpayer to claim unreimbursed expenses as a deduction in arriving at federal adjusted gross income (i.e. a Schedule C deduction) rather than as unreimbursed employee business expenses reported on Schedule A subject to the 2% limitation on miscellaneous deductions. See Rev. Rul. 90-93, 1990-2 C.B. 33. In Rev. Rul. 90-93, the Internal Revenue Service announced the position that a person described in section 3121(d)(3) [a statutory provision dealing with FICA taxes], commonly referred to as a "statutory employee", is "not an employee for purposes of Internal Revenue Code sections 62 and 67." Such persons may properly reflect business income and expenses in full on Schedule C in calculating adjusted gross income under section 62(a)(1). Persons who are employees for purposes of Internal Revenue Code sections 62 and 67 have certain itemized deductions limited as provided by Internal Revenue Code section 67(a).

The petitioners have not presented any evidence to support a position that the husband is a "statutory employee." Furthermore, none of the employers checked the box on the W-2 indicating that the husband was a statutory employee. Accordingly, to the extent that the petitioners' are entitled to claim the husband's unreimbursed business expenses as a deduction, the expenses are reportable as miscellaneous deductions limited as provided by Internal Revenue Code section 67(a).

### 2. Travel Expenses

The husband claimed deductions for travel expenses incurred for trips between his Idaho residence and places of employment, as well as various miscellaneous expenses related to his

employment in the construction industry. ITA disallowed the deductions the husband claimed for unreimbursed travel expenses on the grounds that the husband was not "away from home" within the meaning of Internal Revenue section 162 when the expenses were paid and for lack of substantiation. ITA disallowed the miscellaneous business expenses on the grounds that the husband did not maintain adequate records to establish the specific amounts of the deductions.

Section 162 allows taxpayers to deduct the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including traveling expenses while away from home. Internal Revenue Code section 274(d) and its implementing regulations impose stringent substantiation requirements for the deduction of travel expenses under section 162(a).

a. "Away From Home"

Petitioners must meet three requirements in order to deduct travel expenses under section 162(a)(2): The expenses must be (1) reasonable and necessary; (2) incurred while away from home; and (3) incurred in pursuit of a trade or business. *Flowers v. Commissioner*, 326 U.S. 465, 470 (1946). Furthermore, a taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year. Section 162(a). ITA contends that the travel expenses the husband claimed do not satisfy the second *Flowers* requirement, that husband be "away from home."

Section 162(a)(2) reflects congressional concern both for the unavoidable duplication of expenses and for the fact that meals and lodging are more costly for a person who must travel than they are for a person who can maintain a year-round home. *Rambo v. Commissioner*, 69 T.C. 920, 924 (1978). The purpose of the "away from home" provision is to mitigate the burden

of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode. *Kroll v. Commissioner*, 49 T.C. 557, 562 (1968).

As a general rule, a taxpayer's "home" for purposes of section 162(a)(2) is the vicinity of his principal place of employment, irrespective of where his personal residence is located. *Mitchell v. Commissioner*, 74 T.C. 578, 581 (1980); *Sanderson v. Commissioner*, T.C. Memo. 1998-358. The husband was apparently employed at various construction sites throughout the Northwest including sites in [Redacted]. Thus, under the general rule, the husband's tax home was the vicinity of those sites. However, an exception to the general rule does exist.

Under the exception, if the principal place of business is temporary, and not indefinite, the taxpayer's personal residence may be considered the tax home. *Peurifoy v. Commissioner*, 358 U.S. 59, 60 (1958); *Kroll v. Commissioner*, supra at 562. If the taxpayer incurs substantial and continuous living expenses at the personal residence, he or she may deduct the expenses associated with traveling to, and living at, the jobsite. *Barone v. Commissioner*, 85 T.C. 462, 465 (1985), affd. without published opinion 807 F.2d 177 (9th Cir.1986); *Kroll v. Commissioner*, supra at 562.

A place of business is temporary if the employment is such that termination within a short period could be reasonably foreseen. *Albert v. Commissioner*, 13 T.C. 129, 131 (1949). Conversely, employment is indefinite if termination cannot be foreseen within a "reasonably short period". *Stricker v. Commissioner*, 54 T.C. 355, 361 (1970), affd. 438 F.2d 1216 (6th Cir.1971). Whether employment is temporary or indefinite is a question of fact. *Peurifoy v. Commissioner*, supra at 60-61.

The Court of Appeals for the Ninth Circuit in *Harvey v. Commissioner*, 283 F.2d 491, 495 (9th Cir.1960), revg. 32 T.C. 1368 (1959), has expressed the temporary versus indefinite distinction as follows:

An employee might be said to change his tax home if there is a reasonable probability known to him that he may be employed for a long period of time at his new station. What constitutes a 'long period of time' varies with circumstances surrounding each case. If such be the case, it is reasonable to expect him to move his permanent abode to his new station, and thus avoid the double burden that the Congress intended to mitigate. \* \* \*

Subsequent opinions by the Court of Appeals for the Ninth Circuit reveal that its approach to the exception to the general "tax home" rule does not differ materially from the view of the federal Tax Court. Both courts focus on whether a taxpayer could reasonably expect his or her employment outside the area of his residence to continue beyond a "short" period of time. *Wills v. Commissioner*, 411 F.2d 537, 541 (9th Cir.1969), affg. 48 T.C. 308 (1967); *see also Coombs v. Commissioner*, 608 F.2d 1269, 1274-1276 (9th Cir.1979), affg. in part and revg. in part 67 T.C. 476 (1976).

Petitioner's representative asserts in his letter dated April 8, 2002, that the husband's job covers several western states and that the husband seldom has a job that lasts over one week. However, the husband has acknowledged in a letter dated February 13, 2002, that he is unable to provide ITA with documentation of the dates of travel from his various employers. The husband stated, "they [the employers] will have no records showing the dates that I traveled nor the time frame for which I worked on them." In a letter received by the Commission on December 11, 2001, the husband stated that:

I contract for different local utilities companies throughout the west. . . . I travel all year long to different states and cities. In 1998 I traveled a small portion to [Redacted], and the rest in the Western part of [Redacted]. I traveled anywhere from 50 miles south of

[Redacted] to the border of [Redacted]. Our job sites are at different locations all the time. I work outside on new construction and repair old cable. In 1999 I worked in [Redacted] for 9 months, then I started to work in the [Redacted] for the rest of the year. For the year 2000, I worked in the [Redacted] for most of the year but traveled to [Redacted] frequently to pickup new jobs, and turn in my timesheets. My company [Redacted] was based out of [Redacted]. I travel through the whole year.

Unfortunately, the petitioners have not provided the Commission with sufficient documentation to meet the petitioners' burden of proof that the husband falls within the exception to the general rule when it comes to determining the husband's "tax home". A Notice of Deficiency Determination issued by the Idaho State Tax Commission is presumed to be accurate. *Parsons v. Idaho State Tax Comm'n*, 110 Idaho 572 (Ct. App. 1986). If a material fact upon which a deduction depends is not proved, the taxpayer, upon whom the burden rests, must bear his or her misfortune. *Burnet v. Houston*, 283 U.S. 223 (1931).

#### b. Substantiation

Even if petitioners had persuaded the Commission that the travel expenses the husband claimed as deductions were incurred while he was "away from home", the deductions would be disallowed because petitioners failed to meet the substantiation requirements of section 274(d). Generally, when evidence shows that a taxpayer incurred a deductible expense, but the exact amount cannot be determined, the Court may estimate the amount allowable as a deduction. *Cohan v. Commissioner*, 39 F.2d 540, 543-544 (2d Cir.1930). However, section 274(d) precludes the estimation of travel expense deductions otherwise allowable under section 162. Under section 274(d), all travel expense deductions must meet stringent substantiation requirements. The petitioners did not satisfy the substantiation requirements of section 274(d).

Under section 274(d), no deduction is allowed under section 162 for any travel expense:

unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility or property, or the date and description of the gift, (C) the business purpose of the expense of other item. \* \* \*

To substantiate a deduction by adequate records, a taxpayer must maintain an account book, diary, log, statement of expense, trip sheets, and/or other documentary evidence, which, in combination, are sufficient to establish each element of expenditure or use. Sec. 1.274-5T(c)(2)(i), Temporary Income Tax Regs.

Although the petitioners did produce a few receipts for travel taken during 1998, 1999, and 2000, the petitioners did not maintain a log for mileage deductions claimed or other contemporaneous records for the husband's trips between his Idaho residence and the various [Redacted] job sites. Of those schedules provided, the schedules appear to have been created subsequent to tax year 2000. For example, it appears that the petitioners in 2001 downloaded from the Internet a calendar for tax year 1998, 1999, and 2000 and then highlighted the "travel days." Petitioners offered only husband's uncorroborated testimony as evidence of the claimed travel expenses. Section 274(d) expressly requires corroboration of any statement by the taxpayer as to amounts expended for travel. Petitioners have failed to meet the strict substantiation requirements of section 274(d).

The regulations provide a limited exception to the substantiation requirements of section 274(d). Under section 1.274-5T(c)(5), Temporary Income Tax Regs.:

Where the taxpayer establishes that the failure to produce adequate records is due to the loss of such records through circumstances beyond the taxpayer's control, such as destruction by fire, flood, earthquake, or other casualty, the taxpayer shall have a right to substantiate a deduction by reasonable reconstruction of his expenditures or use.

Petitioners argue that the husband's receipts for 1998 were stolen from his truck; however, the petitioners have not provided any documentation to corroborate the theft or any authority reflecting that a theft would fall within the limited exception.

### 3. Miscellaneous Business Expenses

Petitioner claimed miscellaneous business deductions for repairs and maintenance, supplies, and rents. The rents related to a generator that the husband rented for "Man-Hole" work.<sup>1</sup> ITA denied the miscellaneous business deductions on the grounds that petitioner failed to establish that he incurred the expenses claimed as deductions.

A taxpayer is entitled to deduct the ordinary and necessary expenses he incurs during the taxable year in carrying on a trade or business. Section 162(a). To avail himself of the deduction, a taxpayer is required to maintain adequate records sufficient to establish the amounts of the deductions. *Meneguzzo v. Commissioner*, 43 T.C. 824, 831-832 (1965). The burden of substantiation rests with the taxpayer. *Hradesky v. Commissioner*, 65 T.C. 87, 89-90 (1975), affd. 540 F.2d 821 (5th Cir.1976). Beyond providing an undated statement with the husband's explanation for the expenses claimed, the petitioners did not provide any other documentation in support of the claimed expenses. Therefore, ITA's disallowance of the various non-travel related expenses claimed by the petitioners is affirmed.

As stated above, ITA did not take into consideration the amended return filed by the petitioners for tax year 2000 when ITA issued the NODD. As such, the NODD is modified to include the aforementioned amended return.

WHEREFORE, the Notice of Deficiency Determination dated March 6, 2002, is hereby MODIFIED, in accordance with the provisions of this decision and, as so modified, is APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax, and interest:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
1998	\$2,481	\$771	\$3,252
1999	\$2,552	\$608	\$3,160
2000	\$1,808	\$286	\$2,094
Payment made with 2000 amended return			(\$62)
TOTAL DUE			<u><u>\$8,444</u></u>

Interest is calculated through August 15, 2003, and will continue to accrue at the rate set forth in Idaho Code section 63-3045.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the petitioners' rights to appeal this decision is enclosed with this decision.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2003.

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

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<sup>1</sup> Per undated statement in audit file titled "1998-Memo," which petitioner provided to Commission.

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2003, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]  
[REDACTED]

[Redacted]

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