BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 18470
[Redacted],	)	
	)	DECISION
Petitioner.	)	
	)	

On October 5, 2004, the staff of the Income Tax Audit Bureau of the Idaho State Tax Commission issued a Notice of Deficiency Determination to [Redacted] (taxpayer), proposing income tax and interest for the taxable years 2001 through 2003 in the total amount of $2,436.

On November 28, 2004, the taxpayer filed a timely appeal and petition for redetermination. The taxpayer did not request a hearing but did want to meet with the auditor to provide additional information and documentation to support his position. The Tax Commission, having reviewed the file, hereby issues its decision.

The taxpayer timely filed his 2001, 2002, and 2003 Idaho individual income tax returns. When he filed his 2003 return, the taxpayer also amended his 2001 and 2002 income tax returns. The taxpayer amended his 2001 and 2002 returns to change his residency status from a resident to a part-year resident. His 2003 return was originally filed as a part-year resident. The taxpayer's amended returns were stopped in processing because the taxpayer appeared to be an Idaho resident and he was subtracting his income earned in [Redacted]. The Income Tax Audit Bureau (Bureau) reviewed the taxpayer's amended returns and his 2003 return and determined there were two issues that needed to be examined: the taxpayer's residency status and the unreimbursed employee business expenses.

The Bureau contacted the taxpayer and informed him that his 2001, 2002, and 2003 Idaho income tax returns were being audited. The taxpayer called the auditor and scheduled an appointment but, during the course of their conversation, the taxpayer decided it would be

pointless to have a meeting; so he cancelled the appointment. The auditor explained to the taxpayer that her determination would be based upon the information he provided in their conversation and any other information she had available.

The auditor determined the taxpayer was a resident of Idaho and domiciled in Idaho; he just worked outside of Idaho. The auditor also determined the taxpayer could not claim employee business expenses for being away from home because the taxpayer's tax home had shifted to the location where he was employed. The auditor found that the taxpayer's employment was indefinite rather than temporary. The auditor adjusted the taxpayer's returns and sent him a Notice of Deficiency Determination.

The taxpayer protested the auditor's determination. He stated that his employment during the years in question started as a job that was to end within five weeks. The taxpayer said that when he started he could not have realistically expected his employment with the company to last for more than five weeks let alone more than a year. He stated he is a construction Teamster hiring out of the [Redacted] in [Redacted], [Redacted], and as such he is a temporary employee. The taxpayer stated that because his assignments are temporary, his tax home did not change and he is allowed to deduct his travel costs while working outside his tax home. The taxpayer stated he drew unemployment compensation during this time. In order to receive unemployment compensation, you have to be unemployed and seeking work.

The Bureau referred the matter for administrative review, and the Tax Commission sent the taxpayer a letter giving him two options for having the Notice of Deficiency Determination redetermined. The taxpayer did not respond to the Tax Commission but did contact the auditor and ask if he could provide her with additional documents and information. The auditor scheduled a meeting with the taxpayer, and he provided the following information.

The taxpayer stated he was a long-time Idaho resident. He has a home in [Redacted], Idaho, and uses a post office box in [Redacted] Idaho. The taxpayer has purchased resident fish and game licenses since 1990, and he has had an Idaho driver's license since 1992. The taxpayer is a union construction worker usually employed to drive dump trucks, water trucks, and 40 ft. flatbeds. The taxpayer receives his work assignments from the [Redacted] in [Redacted], [Redacted].

On April 23, 2001, the taxpayer was called to work by [Redacted], [Redacted] (Company) for work at the [Redacted]. The taxpayer stated the Company bid work packages at the [Redacted]. The package he started work on was to last five weeks; however, the Company liked the taxpayer's work so he continued to be employed until the events of September 11, 2001. After those events, the Company was awarded more work packages to secure the site from potential terrorist attack. As a result, the taxpayer was employed through the end of the year.

The taxpayer's employment continued with the Company until February 18, 2003, when he was laid off for a week. From February 18, 2003, to January 6, 2004, he worked fairly steadily. He was off six days in February, six days in March, two days in June, seven days in July, seven days in August, six days in September, and seven days in October. The taxpayer's final layoff from the Company was on January 6, 2004. The taxpayer stated he was told prior to the January 6 layoff that there would be no new work packages for the Company.

The taxpayer described and provided copies of the Union rules regarding employee layoffs and rehires. Essentially, once an employee is hired through the Union, a company can rehire that employee after a layoff if that employee had worked for the company within a three-year period. Therefore, the taxpayer could be and was rehired directly by the Company rather than waiting his turn and moving up the list at the Union Hall.

The taxpayer repeatedly stated that he had no idea how long he would be employed by the Company. He stated he could be laid off any day because his assignments were temporary. He said all construction work is temporary; none of it is permanent by the nature of the work. His view is that a construction project begins at a particular site and, when that project is completed, the job ends. Nothing is permanent. Consequently, because of the temporary nature of his employment, the taxpayer believes his tax home did not shift from Idaho to the [Redacted] in [Redacted]. He stated that since his tax home was in Idaho, he is allowed to deduct his expenses for travel while away from home.

The Bureau's Notice of Deficiency Determination addressed two issues on the taxpayer's income tax returns, the taxpayer's residency status and the unreimbursed employee business expenses. In his appeal, the taxpayer only addressed the unreimbursed employee business expenses. The only time the residency issue was mentioned was during the telephone conversation with the auditor. The taxpayer stated that someone at the State Tax Commission told him he did not have to report his [Redacted] wages to Idaho; therefore, the taxpayer began filing as a part-year resident in 2003 and amended his 2001 and 2002 returns subtracting his [Redacted] wages.

The Tax Commission found nothing in the record that shows the taxpayer abandoned Idaho and acquired [Redacted] as his place of domicile. In fact, all the information available and all the taxpayer's statements confirm that the taxpayer considered Idaho his home. Since the taxpayer has not presented any arguments that his domicile was not Idaho, the Tax Commission finds that the taxpayer was domiciled in Idaho, and the proper form for filing his Idaho income tax returns was the full year resident form.

The primary issue in this case is the disallowance of the taxpayer's employee business expenses for travel while he was away from home. Internal Revenue Code section 162(a)(2) states in pertinent part,

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including-
> . . .
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;
> . . .
> For purposes of paragraph (2), the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year.

The taxpayer's employment with the Company was from April 23, 2001, to January 6, 2004. Looking strictly at the length of employment, one would say that the taxpayer's employment with the Company exceeded a year and therefore he was not temporarily away from home. However, other factors could cause an extension of the employment that does not necessarily make the job indefinite. Generally, an individual can determine whether his assignment is temporary or indefinite when the assignment is started. If an assignment is expected to last for less than one year, it is considered temporary unless there are facts and circumstances that indicate otherwise.

> "The purpose of allowing the deduction of living expenses while a taxpayer is 'away from home' is 'to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses.' . . . In furtherance of this purpose, when a taxpayer with a principal place of employment goes elsewhere to take work which is merely temporary he may deduct the living expenses incurred at the temporary post of duty, because it would not be reasonable to expect him to move his residence under such circumstances." Tucker v. Commissioner, 55 T.C. 783, 786 (1971).

An individual's tax home is usually his principal place of employment, Wills v.

Commissioner, 411 F.2d 537 (9th Cir. 1969), affg. 48 T.C. 308 (1967), and his expenses for meals and lodging in that vicinity are nondeductible under Internal Revenue Code section 262. However, an individual can deduct such expenses if incurred when he is temporarily employed away from his permanent home. Peurifoy v. Commissioner, 358 U.S. 59 (1958). When an individual accepts employment of an indefinite or permanent nature, the location of his tax home shifts to the vicinity of his employment. Commissioner v. Peurifoy, 254 F.2d 483, 486--487 (4th Cir. 1957), rev'g 27 T.C. 149 (1956), affd. per curiam 358 U.S. 59 (1958). Employment which is originally temporary may become indefinite due to changed circumstances or simply by the passage of time. Kroll v. Commissioner, 49 T.C. 557, 562 (1968); Garlock v. Commissioner, 34 T.C. 611, 615 (1960).

The Ninth Circuit Court of Appeals stated in Harvey v. Commissioner, 283 F.2d 491, 495 (9th Cir. 1960), rev'g 32 T.C. 1368 (1959), "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." This view on a taxpayer's tax home is slightly different than what other courts have stated about the temporary or indefinite nature of an individual's employment. However, in a later case, Wills v. Commissioner, supra, the Ninth Circuit stated it would not avoid using the term “indefinite” to identify employment that was neither temporary nor of substantially short duration. Thus the state of the law on this issue is not materially different in the Ninth Circuit than it is elsewhere. Hillgren v. Commissioner, T.C. Memo. 1980-101 (1980).

When the taxpayer began work for the Company, there was no doubt that his employment was temporary. He was hired to do a job that was to last only five weeks. However, the question is whether taxpayer's employment was temporary throughout his employment with the Company, i.e., whether there was a reasonable probability known to the

taxpayer that his employment would last for a substantially long period of time. If the taxpayer's employment was temporary, Idaho would have been his tax home, and the traveling expenses incurred in connection with his employment with the Company are deductible under Internal Revenue Code section 162(a)(2). Whether the taxpayer's employment was temporary is a question of fact, Peurifoy v. Commissioner, supra.

Unquestionably, at the outset the taxpayer's employment lacked permanence. However, it is apparent that at some point the taxpayer should have had an inkling that his employment was indefinite or was for a substantially long period of time. Hillgren v. Commissioner, supra. The taxpayer stated he could have been fired or laid off at any time on any day that he reported to work; therefore his employment was temporary. However, the taxpayer also stated the Company liked his work, and the Company called him back to work directly rather than hiring someone else at the Union's hiring hall.

Whenever termination of employment cannot be foreseen within a fixed or reasonably short period of time, the taxpayer's tax home shifts to such place of employment and he does not satisfy the "away from home" requirement. Stricker v. Commissioner, 54 T.C. 355, 361 (1970), affd. 438 F.2d 1216 (6th Cir. 1971). Furthermore, if employment which was temporary in contemplation at the date of its commencement becomes indeterminate in duration, "the situs of such employment for purposes of the statute becomes the taxpayer's home." Bride v. Commissioner, T. C. Memo. 1981-443 (1981) citing Kroll v. Commissioner, supra.

Employment is considered indefinite unless termination is actually foreseeable within a fixed or reasonably short period of time, i.e. the first initial employment with the Company for five weeks. Michel v. Commissioner, 629 F.2d 1071 (5th Cir. 1980), affg. T.C. Memo. 1977-345; Stricker v. Commissioner, supra. at 361. Brief interruptions of work at a particular

location do not, standing alone, cause employment which would otherwise be indefinite to become temporary. Blatnick v. Commissioner, 56 T.C. 1344, 1348 (1971). Moreover, even if a job is temporary at the time it is accepted, later developments may show that it became indefinite. McCall v. Commissioner, T.C. Memo. 1987-141 (1987).

From the information available, it is clear that the taxpayer did not have a permanent position with the Company. However, the Company had a presence at the [Redacted] site and work packages were continually made available, so the prospects for continued employment were very likely considering the taxpayer's work history with the Company. The short interruptions when the taxpayer was laid off for a week at a time in 2003 do not alter the fact the taxpayer was employed by the Company for almost three years. In fact, the documents the taxpayer provided showing he was laid off by the Company stated he was on standby for lack of work. The indication here is that the Company planned on bringing the taxpayer back as soon as it had work for the taxpayer. Therefore, it is not unreasonable that the taxpayer knew he had employment with the Company as long as the Company was awarded work packages. It was not until just prior to January 6, 2004, that the taxpayer knew his termination was eminent.

The fact that the taxpayer's actual employment was longer than one year and the absence of a foreseeable termination before January 6, 2004, are persuasive in the Tax Commission finding that the taxpayer's employment with the Company was indefinite. However, as previously mentioned, the taxpayer's employment was not indefinite at the outset. When the taxpayer began working for the Company, the taxpayer had sufficient reason to believe his employment would be temporary or for a short duration. But as time progressed and the events of September 11, 2001, unfolded, the temporary nature of the taxpayer's job changed from temporary to indefinite. Therefore, the Tax Commission finds that the taxpayer's tax home

remained in Idaho until shortly after September 11, 2001, at which time it shifted to the [Redacted] until his employment was terminated with the Company on January 6, 2004.

As a result, the taxpayer would be entitled to away-from-home expenses for the period of April 23, 2001, to September 11, 2001. However, the taxpayer did not provide any documentation to substantiate any of his away-from-home expenses. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed. New Colonial Ice Co., Inc. v. Helvering, 292 U.S. 435, 54 S.Ct. 788 (1934). The petitioner bears the burden of proving that he is entitled to the deduction. Higgins v. Commissioner, T.C. Memo. 1984-330 (1984). The burden rests upon the taxpayer to disclose his receipts and claim his proper deductions. U.S. v. Ballard, 535 F.2d 400 (1976). If a taxpayer is unable to provide adequate proof of any material fact upon which a deduction depends, no deduction is allowed and that taxpayer must bear his misfortune. Burnet v. Houston, 283 U.S. 223, 51 S.Ct. 413 (1931). Since the taxpayer did not substantiate his away-from-home expenses, the Tax Commission is under no obligation to allow any part of his expenses. Therefore, the Tax Commission upholds the Bureau's determination that the taxpayer was an Idaho resident and the disallowance of his unreimbursed employee business expenses.

WHEREFORE, the Notice of Deficiency Determination dated October 5, 2004, is hereby APPROVED, AFFIRMED, and MADE FINAL.

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

YEAR	TAX	INTEREST	TOTAL
2001	$ 895	$221	$1,116
2002	1,522	278	1,800
2003	(252)	(33)	(285)
		TOTAL DUE	$2,631

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

An explanation of the taxpayer's right to appeal this decision is included with this decision.

DATED this ____ day of _____, 2006.

IDAHO STATE TAX COMMISSION

_____
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2006, 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] Receipt No.

_____