

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 92-235

BILLY CALDWELL
204 Arlington Road
Athens, AL 35611,

§

§

Taxpayer.

§

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed income tax against Billy Caldwell (Taxpayer) for 1985, 1986 and 1987 and against Billy B. and Joanne Caldwell for 1988. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 10, 1992. Christine Sampson Hinson appeared for the Taxpayer. Assistant counsel Beth Acker represented the Department.

The primary issues in this case are (1) was the Taxpayer subject to Alabama income tax from 1985 until May, 1988, and (2) if so, can the Taxpayer deduct work-related travel and living expenses incurred during the subject period.

The Taxpayer is a native of Tennessee and was hired by the Tennessee Valley Authority (TVA) as an engineer in 1977. The Taxpayer lived in Knoxville and was based at the TVA's headquarters in Knoxville from 1977 until 1985.

The Taxpayer was assigned by the TVA to work on the Anchor Bolts Inspection Project ("Anchor Project") at the Browns Ferry Nuclear Plant ("Browns Ferry") in Alabama in May, 1985.¹ The

¹ While living in Knoxville, the Taxpayer had worked periodically for two week intervals with other TVA engineers at Browns Ferry from 1982 until 1985 (transcript at page 26).

Taxpayer was told by the TVA that the assignment would not last more than one year.

The Taxpayer moved from Knoxville into a motel room in Huntsville when he started working at Browns Ferry in May, 1985.

The Taxpayer moved most of his belongings into his sister's house in Louisville, Tennessee, although he stored some of his large furniture in Knoxville.

The Taxpayer subsequently moved into a rented house in Huntsville in late May or June, 1985, and later moved into another rented house in Madison, Alabama sometime in 1986. The Taxpayer lived in Madison until he purchased a house and moved permanently to Athens, Alabama in May, 1988.

The Taxpayer rolled out of the Anchor Project and immediately into the Hanger Inspection Project ("Hanger Project") at Browns Ferry in late 1985 or 1986.² The Taxpayer was not told how long his assignment on the Hanger Project would last (transcript at page 69). The Taxpayer worked continuously at Browns Ferry until November, 1987, did not work at the facility during November, 1987, but returned to the facility as a task engineer from December, 1987 until May, 1988. The Taxpayer was finally assigned to a "permanent" position at Browns Ferry in May, 1988. He and his new wife bought a house in Athens, Alabama and moved to Alabama permanently at that time. The Taxpayer was officially on

² The Taxpayer's testimony on this point is unclear. At one point he claims that he changed from the Anchor Project to the Hanger Project in late 1985 (transcript at page 56), but elsewhere claimed that the change occurred in July or August, 1986 (transcript at page 51).

"continuous travel status" with the TVA prior to May, 1988. Consequently, he received monthly reimbursement for his travel and living expenses in addition to his salary. The travel expenses were incurred for travel to and from Browns Ferry and for several short trips back to TVA headquarters in Knoxville. The living expenses were primarily for rent during the period.

The Taxpayer maintained his personal ties with Tennessee and visited Tennessee regularly during the subject period. The Taxpayer also retained his Tennessee drivers license and bank account during the period. The Taxpayer purchased a house in Alabama in 1986, but rented the house and never used it as his personal residence. The Taxpayer testified that he considered Tennessee to be his permanent home until he and his wife moved to Alabama in May, 1988.

The Taxpayer did not file Alabama income tax returns for 1985, 1986 or 1987. He filed a joint return with his wife in 1988, but failed to report his income earned in Alabama prior to May, 1988.

The Department entered the assessments in issue based on (1) wages earned by the Taxpayer in Alabama, (2) travel and living expense reimbursement received from the TVA, and (3) deferred compensation that is not subject to federal tax but is taxable in Alabama. The Department examiner also allowed the standard deduction and a personal exemption in each year.

The Taxpayer argues that he was not domiciled and did not reside in Alabama until May, 1988, and consequently is not liable

for Alabama income tax prior to May, 1988. In the alternative, the Taxpayer argues that if he is liable for Alabama tax, he owes only on his income earned in Alabama. The Taxpayer provided a breakdown with his post-hearing brief setting out income earned in Alabama and income earned in Tennessee.

The Taxpayer also claims that his travel and living expenses can be deducted as ordinary and necessary employee business expenses because he was away from his tax home on "temporary" assignment at Browns Ferry prior to May, 1988.

The Department does not dispute the amount of the claimed expenses, but argues that the expenses cannot be deducted because the Taxpayer's employment at Browns Ferry was "indefinite". In that case, his tax home changed to Browns Ferry and his related expenses were commuting and other personal expenses and cannot be deducted. Every person domiciled in Alabama is subject to Alabama income tax. Code of Ala., 40-18-2(7). "Domicile" for tax purposes has been defined as an individual's true, fixed home to which he intends to return when absent. Whetstone v. State, 434 So.2d 796. To change domiciles, the old domicile must be abandoned and a new one acquired along with the intent to remain permanently at the new domicile. Jacobs v. Ryals, 401 So.2d 776. The presumption is against a change unless the facts clearly prove otherwise.

The Taxpayer's domicile of origin was Tennessee. The Taxpayer lived and worked in Alabama almost continuously after May, 1985, but he did not intend to change domiciles and took no action

indicating a permanent change of domicile to Alabama until May, 1988. Consequently, the Taxpayer was not domiciled in Alabama prior to May, 1988.

However, the fact that the Taxpayer was not domiciled in Alabama does not mean that he was not subject to Alabama income tax prior to May, 1988. All individuals residing in Alabama are subject to Alabama tax, and every individual that lives in Alabama for at least seven months during a tax year is presumed to be residing in the State for tax purposes. Code of Ala. 1975, §40-18-2(7).

The Taxpayer lived and worked in Alabama almost continuously after May, 1985. The Taxpayer clearly resided in Alabama and was subject to Alabama income tax during the period in issue.

Even if the Taxpayer was a nonresident during the subject years, nonresidents must still report and pay Alabama tax on income earned in Alabama. Code of Ala. 1975, §40-18-2(6). However, because the Taxpayer resided in Alabama, he was subject to Alabama tax on income earned everywhere.³

The living and travel reimbursement received by the Taxpayer was properly included as gross income in Alabama. The issue is whether the expenses were also deductible pursuant to Code of Ala.

³ Consequently, the Taxpayer's breakdown of income earned in Alabama versus Tennessee is not relevant. Also, I question the method used by the Taxpayer to determine in which State his income was earned. The Taxpayer worked full-time at Browns Ferry and I would think all of his income was earned in Alabama, notwithstanding that he took short business trips back to Tennessee.

1975, §40-18-15(1) as ordinary and necessary expenses incurred in carrying on a trade or business.

To be deductible, employee business expenses must be incurred while the employee is away from his tax home. See, Department Reg. 810-3-15-10. An employee's "tax home" is defined in the above regulation as the place where the employee spends most of his working time or the place at which his business activities are centered.

An employee is away from his tax home if his assignment elsewhere is "temporary" in nature. However, if the assignment is for an "indefinite" period with no reasonably foreseeable end, the employee is considered to have changed his tax home to the new location and his travel and living expenses relating thereto cannot be deducted.

The criteria for distinguishing "temporary" versus "indefinite" employment is set out in Dahood v. United States, 585 F.Supp. 93, as follows:

To qualify as "temporary", the employment of the taxpayer must be that which is foreseeably for a short period of time or for a fixed duration. Boone v. United States, 482 F.2d 417, 419 (5th Cir. 1973). In contrast, employment is categorized as "indefinite" or "indeterminate" when the prospect is that the work will continue for an indeterminate and substantially long period of time. Id.; Neal v. Commissioner of Internal Revenue, *supra*, Kasun v. United States, 671 F.2d 1059 (7th Cir. 1982). An employment which was temporary at inception may become indefinite if it extends beyond the short term. Kasun v. United States, *supra*, 671 F.2d at 1061; Boone v. United States, *supra*, 482 F.2d at 419, n. 4. The determination of whether a job is "temporary" or "indefinite" presents a factual question which requires the Court to examine all of the circumstances of the case

before reaching its conclusion. Kasun v. United States, 671 F.2d at 1061 (and authorities therein cited).

In this case, the Taxpayer was technically on "continuous travel status" with the TVA prior to May, 1988. The Anchor Project was not expected to last more than a year. However, once the Taxpayer rolled into the Hanger Project the length of his expected employment was unknown or indefinite. Even if the assignment at Browns Ferry was initially temporary, it became permanent over the 36 months that the Taxpayer worked almost continuously at the facility prior to May, 1988.⁴ Kasun v. United States, supra, at 1061. Under the circumstances, the Taxpayer's tax home during the subject period was Browns Ferry, and accordingly, his related travel and living expenses cannot be deducted. The above conclusion is supported by the following Tax Court cases in which a TVA employee on "temporary assignment" by the TVA was denied a deduction for living expenses because his assignment was indefinite. James A. Baugher and Patricia A. Baugher v.

⁴ After the hearing, the Taxpayer offered four affidavits from his supervisor at Brown's Ferry reassigning him to his "temporary" job at the facility. The memos are dated May 5, 1987, August 8, 1987, November 27, 1987, and January 17, 1988. See January 28, 1993 letter from Taxpayer's attorney with affidavits attached. The Department objected to the affidavits by letters dated January 29, 1993 and March 17, 1993.

The Department's objections are proper. However, even if the affidavits are accepted and considered, they do not change the substantive nature of the Taxpayer's employment at Browns Ferry. He worked continuously at the facility from May, 1985 through May, 1988 (except November, 1987), and even the Taxpayer concedes that the TVA's characterization of the assignment as temporary is not controlling for tax purposes. See Taxpayer's letter of February 22, 1993. See also the below cited Tax Court decisions.

Commissioner, T.C. Memo 1984-191; Earl Wren and Lorna Wren v. Commissioner, T.C. Memo 1984-456; Robert E. Terry and Cynthia E. Terry v. Commissioner, T.C. Memo 1984-457; E. Blatnick, 56 T.C. 1344; and G. A. Ostrand, T.C. Memo 1981-304. See also, Administrative Law Div. Docket No. Inc. 84-150.

The Taxpayer was allowed only the standard deduction and a personal exemption in each year. The Taxpayer should be allowed until May 3, 1993 to file amended returns and claim any additional itemized or other deductions to which he may be entitled, i.e. rental house expenses, employee travel expenses incurred on trips to Knoxville, etc.

If amended returns are filed, the Department should review the returns and notify the Administrative Law Division of the adjusted amount due for each year. A Final Order will be entered accordingly. If no amended returns are filed, the Final Order will affirm the assessments as previously entered.

Entered on March 24, 1993.

BILL THOMPSON
Chief Administrative Law Judge