MALCOLM D. & DIANNE HERRING ' STATE OF ALABAMA
3950 Johnstown Drive DEPARTMENT OF REVENUE
Montgomery, AL 36109, ' ADMINISTRATIVE LAW DIVISION

Taxpayers, ' DOCKET NO. INC. 98-516

v. '

STATE OF ALABAMA '
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed income tax against Malcolm D. & Dianne Herring (together ATaxpayers@) for the years 1990 through 1995. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on February 24, 1999. The Taxpayers appeared at the hearing. Assistant Counsel David Avery represented the Department.

Malcolm Herring (individually ATaxpayer@) received a monthly expense reimbursement from his employer during the years in issue. The issue in this case is whether the Taxpayer should have reported the amounts as income on his Alabama income tax returns, and if so, can he offset the income by deducting his business-related expenses.

The Taxpayer worked as Temple Recorder at the Alcazar Shrine Temple in Montgomery, Alabama from 1978 until 1995. As Recorder, the Taxpayer traveled regularly on Shrine business, including regular trips outside of Alabama. The Taxpayer traveled in his own vehicle, and recorded his business miles traveled in a daily log.

Before 1990, the Taxpayer received only a salary from the Temple. In 1990, the Temple began paying the Taxpayer a monthly expense reimbursement of $583 in addition to his salary. The Temple raised the amount to $1,000 a month in July 1993.

The Taxpayer=s accountant advised him not to report the expense reimbursement as income on his Alabama income tax returns. The Department audited the Taxpayer and included the reimbursement as income. The Department also refused to allow the Taxpayer to offset the income with his travel expenses because he failed to provide substantiating records. The Taxpayer did not provide a copy of his daily travel logs until the February 22, 1999 hearing.

Employee business expenses constitute ordinary and necessary business expenses pursuant to Code of Ala. 1975, '40-18-15(a)(1). If an employee is reimbursed for expenses under an accountable plan, the employee is not required to report the income, and thus is not required to deduct the expenses. IRC Reg. 1.62-2(c)(4). The Taxpayer was not reimbursed under an accountable plan because he was not required to account to the Temple for his specific expenditures. He also was not obligated to reimburse the Temple for any unspent amounts. See again, IRC Reg. 1.62-2(c).

An employee reimbursed under an unaccountable plan, such as the Taxpayer, must report the reimbursement as income. All business-related expenses can then be deducted as itemized deductions, subject to the 2 percent of adjusted gross income floor. If the employee fails to keep a record of exact expenses, he may claim a standard mileage rate for business miles traveled.

The Taxpayer in this case failed to keep exact records of the amounts spent on travel. As indicated, however, he did keep a daily log of business miles traveled. The Taxpayer traveled 19,585 miles in 1990, 21,905 miles in 1991, 21,474 miles in 1992, 36,248 miles in 1993, 34,496 miles in 1994, and 33,746 miles in 1995. The applicable standard mileage rate was 26 cents a mile in 1990, 27.5 cents a mile in 1991, 28 cents a mile in both 1992 and 1993, 29 cents a mile in 1994, and 30 cents a mile in 1995. Those rates should be multiplied by the annual miles traveled to arrive at the Taxpayer=s travel expenses in each year, subject to the 2 percent floor.

The Department is directed to recalculate the Taxpayer=s liability for the subject years as indicated above. An appropriate Final Order will then be entered.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court pursuant to Code of Ala. 1975, '40-2A-9(g).

Entered May 14, 1999.

____

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: David E. Avery, III, Esq.
Malcolm D. & Dianne Herring
Kim Herman (417-36-0508)