JOSEPH J. RIPLEY, JR.
11 Kingwood Circle
Franklin, NC 28734,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 00-328

FINAL ORDER ON DEPARTMENT=S APPLICATION FOR REHEARING

The issue in this case is whether the Taxpayer should be allowed to deduct certain education-related expenses as ordinary and necessary business expenses pursuant to Code of Ala. 1975, '40-18-15(a)(1). A Final Order was entered on January 23, 2001 holding that the expenses could be deducted. The Department timely applied for a rehearing.

In holding that the expenses could be deducted, the Administrative Law Division relied on *Toner v. C.I.R.*, 623 F.2d 315 (3rd Cir. 1980). The issue in *Toner* was whether a teacher employed by a private school could deduct education expenses that qualified her to teach in a public school. The court, relying on Treasury Reg. '1.162(5)(b)(3), held that the expenses could be deducted because teaching in a public school was the same general type of work as teaching in a private school. The education thus did not quality the teacher for a new trade or business. Applying the rationale of *Toner*, I thus held that the Taxpayer=s education-related expenses that would have qualified him as a registered nurse could be deducted because his duties as a registered nurse would have been the same general type of work as his current position as a critical care nursing technician.

In its application for rehearing, the Department relies on *Robinson v. C.I.R.*, 78 Tax Court 500 Tax Ct.

Rep. (CCH) 38,911 (1982). In *Robinson*, the issue was whether education expenses that qualified a licensed practical nurse to be a registered nurse could be deducted. The court held that the expenses could not be deducted because a registered nurse=s duties were significantly different than those of a licensed practical nurse, and thus constituted a new trade or business.

> Thus, it is evident that the hospital views registered nursing as a significantly different occupation from practical nursing. The level of authority delegated to an RN is appreciably greater than that granted to an LPN, and, in all events, the LPN is subject to the supervisory powers of an RN. For example, LPNs must have drug dosages checked by an RN before drug administration to patients. Verbal drug orders from doctors may not be accepted by an LPN. Nor may an LPN hand out nursing assignments, a primary responsibility of an RN. These, among other differences, highlight the differing levels of responsibility of an RN and an LPN. It is on the strength of these distinctions made by petitioner=s employer, St. Cloud Hospital, and on the basis of the relevant State law that we feel constrained to disallow petitioner=s claim.

Robinson, (CCH) 38,911 at 555.

> The *Robinson* court also distinguished *Toner*, as follows:
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> We are aware of the difficulty that courts have encountered in the area of defining the parameters of certain trades or businesses. To clearly articulate the distinction between the maintenance and refinement of skills in one business and the qualification of an individual for another related business presents a formidable task in certain factual settings. Compare *Toner v. Commissioner*, 623 F.2d 315 (3rd Cir. 1980), revg. 71 T.C. 772 (1979), and *Laurano v. Commissioner*, 69 F.C. 723 (1978) (Canadian teacher was entitled to deduct educational costs qualifying her to teach in New Jersey), with *Sharon v. Commissioner*, 66 T.C. 515 (1976), affd. 591 F.2d 1273 (9th Cir. 1978) (costs incurred by New York attorney for a California bar review course were nondeductible), *Davis v. Commissioner*, 65 T.C. 1014 (1976) (social caseworkers and professors of social work are in different businesses), and *Gleen v. Commissioner*, supra. In *Toner v. Commissioner*, supra, the Third Circuit held that a parochial school teacher who took courses leading to a bachelor=s degree which enabled her to teach in public school was entitled to deduct the costs of her education. The Court, in seizing upon respondent=s regulation at section 1.162-5(b)(3) announced that if the regulation envisions no change of business when a classroom teacher becomes a guidance counselor, then it is equally certain that an erstwhile parochial school teacher has not changed businesses when she joins the faculty of a public school. The Court saw little, if any, qualitative difference in duties between the two teaching posts. While it is abundantly

> clear that a Ateacher is a teacher is a teacher@ (*Toner v. Commissioner*, 71 T.C. 772, 790 (1979) (Goffe, J., dissenting)), we believe the instant facts to be distinguishable from *Toner*. The heightened level of professional judgment, the increase in skills one can perform, and the supervisory powers exercised by an RN serve to distinguish the RN from the LPN in job function and responsibility. Accordingly, the sweeping view of teaching, as expressed in *Toner*, is inapplicable to the types of nursing involved herein.

Robinson, (CCH) 38,911 at 558.

The facts in issue are in substance the same as the facts in *Robinson*. The Taxpayer worked as a critical care nursing technician during the period in issue. According to the Department, the Alabama Board of Nursing categorizes Anursing technicians@ as Aunlicensed assistant personnel.@ As in *Robinson*, education expenses that would have qualified the Taxpayer as a registered nurse would have significantly changed his job function and responsibilities, and thus would have qualified him for a new trade or business. Consequently, his education-related expenses cannot be deducted.

The Final Order previously entered in this case is voided. Judgment is entered against the Taxpayer for 1996 tax and interest of $708.58, and 1997 tax and interest of $582.16. Additional interest is also due from the date of entry of the final assessments, May 4, 2000.[1]

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[1]The Taxpayer=s representative argues that even if the education expenses are disallowed, certain expenses relating to the Taxpayer=s service in the U.S. Army Reserve should still be allowed, thereby reducing the final assessments in issue. However, my understanding is that the final assessments are based entirely on the disallowed education expenses. If the Taxpayer=s representative disagrees, he should contact Department Assistant Counsel Keith Maddox for an explanation. If he is still not satisfied, he should

apply for a rehearing within 15 days of this Final Order on Application for Rehearing. Appropriate action will then be taken to resolve the matter.

This Final Order on Department=s Application for Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, '40-2A-9(g).

Entered April 3, 2001.