STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. INC. 88-130
RAY & KAREN CARMACK Route 1, Box 316 Warrior, AL 35180,	§	
Taxpayer.	§	

ORDER

The Revenue Department assessed income tax against Ray and Karen Carmack (Taxpayers) for the years 1982, 1983, 1984, and 1986. The Taxpayers appealed to the Administrative Division and a hearing was conducted on July 12, 1989. Ray Carmack (Taxpayer) was present and represented the Taxpayers. Assistant counsel Gwendolyn Garner appeared for the Department. The following findings of fact and conclusions of entered based on the evidence and arguments parties.

FINDINGS OF FACT

The Taxpayers deducted travel expenses on their joint Alabama income tax returns for the years 1982 through 1986 relating to travel by the Taxpayer from his residence in Warrior, Alabama to his job with the Tennessee Valley Authority (TVA) at the Brown's Ferry Nuclear Plant in Athens, The Department disallowed the deductions and the appealed to the Administrative Law Division.

The Taxpayer belongs to the Asbestos Workers Local No. 78 in Birmingham, but worked almost continuously during the subject years at the TVA.'s Brown's Ferry facility. The Taxpayer traveled to the

facility each workday from his home in Warrior, Alabama, a total of approximately 224 miles round trip.

The Taxpayer was first employed by the TVA from December, 1976 through May, 1977. The Taxpayer was reemployed by the TVA on August 7, 1979 and worked continuously at the Brown's Ferry facility until September 30, 1985, except for a few days at the end of each year between contracts.[1] After a short break during which the Taxpayer worked in Florida and Georgia,[2] the Taxpayer was reemployed by the TVA in May, 1986 and worked through the end of the year. The Taxpayer was employed by the TVA at the time of the administrative hearing.

The Taxpayer was employed by the TVA under a succession of so-called "11-29' contracts. The 11-29 contract is customarily used by the TVA in hiring hourly workers and under the contract the worker is employed for 11 months and 29 days, is laid off for several days, and is then customarily reemployed under another 11-29 contract. The worker can be laid off at any time under the contract, and the TVA considers the 11-29 workers to be temporary employees.

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[1]The evidence indicates that the Taxpayer worked for the TVA under separate contracts from August 7, 1979 to April 16, 1980; from April 14, 1981 to April 1982; from April 16, 1982 to April 14, 1983; from April 15, 1984 until April 13, 1984; from April 17, 1984 to April 15, 1985; and from April 15, 1985 to September 30, 1985.

[2]The Department agrees that the Taxpayer's travel expenses from his residence in Warrior to his temporary work places in Florida and Georgia should be allowed.

CONCLUSIONS OF LAW

Alabama law on the subject of business expenses is modeled after the federal statute on point, 26 U.S.C.A. §162, and allows a deduction for all ordinary and necessary business expenses, see Code of Ala. 1975, §40-18-15(a)(1). Deductible expenses include all reasonable expenses incurred while traveling away from home in the pursuit of business. C.I.R. v. Flowers, 326 U.S. 465, 66 S. Ct. 250.

However, daily commuting expenses are personal in nature and thus are not deductible. Kasun v. U.S., 671 F.2d 1059. An exception to the nondeductibility of commuting expenses is where the job is temporary in duration as opposed to indefinite. Peurifoy v. Commissioner, 358 U.S. 59, 79 S.Ct. 104.

Employment is temporary if it can be expected to last for only a short period, and must be temporary in contemplation at the beginning. McCallister v. Comm., 70 T. C. 505. As stated in Kasun v. U.S., supra, at 1061:

> Determination of whether a job is temporary or indefinite is a factual question. Peurifoy V. Commissioner, 358 U.S. 59, 61, 79 S.CT. 104, 105, 3 L.Ed.2d 30 (1958). The court must examine all of the circumstances of the case before reaching its conclusion. Frederick v. United States, 603 F.2d 1292, 1296 (8th Cir. 1979). When reviewing the facts, the court must bear in mind that employment which was temporary may become indefinite if it extends beyond the short term. Also, employment which merely lacks permanence is indefinite unless termination is foreseeable within a short period of time. See Boone v. United States, 482 F.2d 417, 419 n.4 (5th Cir. 1973).

As a rule of thumb, if employment is expected to last and does last for less than a year, then the issue must be decided on the particular facts and circumstances of the case. If the job lasts for one but not more than two years, then there is a rebuttable presumption that the job is not temporary. However, an actual or expected stay of two years or more is considered indefinite, regardless of the facts or circumstances, see Melton v. Comm.,51 T.C. Memo 1986-92, also IRS Reg. 83-82, 1983-CB 45.

In the present case, the Taxpayer worked for the TVA at the Brown's Ferry facility in effect continually from April 14, 1981 through September, 1985 and from May, 1986 through February, 1988. Consequently, based on the criteria set out above for determining temporary versus indefinite employment, the Taxpayer's employment -with the TVA was indefinite and thus the travel expenses relating thereto are not deductible. For similar cases involving the TVA in which employment under the 11-29 contracts was held to be indefinite, see Baughar v. Comm., 47 T. C. Memo 1984-191; Presley v. Comm,, 44 T.C. Memo 1982-434; and Melton v. Comm., 51 T.C. Memo 1986-92.

The above considered, the assessments are correct and the Revenue Department is hereby directed to make the assessments final as entered, with applicable interest.

Entered this 15th day of August, 1989.

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BILL THOMPSON
Chief Administrative Law Judge