

EUGENE B. MALONE  
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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 10-799

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

**OPINION AND PRELIMINARY ORDER ON  
TAXPAYER'S SECOND APPLICATION FOR REHEARING**

The Revenue Department assessed Eugene B. Malone ("Taxpayer") for 2002, 2003, 2004, and 2005 Alabama income tax. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a.

The Taxpayer failed to file Alabama income tax returns for the subject years. The Department subsequently received IRS information indicating that the Taxpayer was required to file Alabama income tax returns for those years. It consequently assessed the Taxpayer for the tax due, plus penalties and interest, based on the IRS information. On appeal, the Administrative Law Division directed the Taxpayer to submit 2002, 2003, 2004, and 2005 Alabama income tax returns and records substantiating the deductions claimed on the returns. He did so.

The Taxpayer met with Department examiner Anthony Bethea in the Auburn Taxpayer Service Center on April 28, 2011 concerning the deductions claimed on the returns. The Department responded that the 2002, 2003, 2004, and 2005 final assessments should be reduced to \$3,652.34, \$2,039.35, \$2,917.01, and \$5,173.89, respectively. A Final Order was entered on August 29, 2011 for the reduced amounts due.

The Taxpayer timely applied for a rehearing and submitted additional records for review. The Department responded that no additional changes should be made to the Taxpayer's liabilities. A Final Order on Rehearing was entered on April 2, 2012 affirming the August 29, 2011 Final Order. The Taxpayer applied for a second rehearing. A hearing was conducted on September 18, 2012. The Taxpayer attended the hearing. Assistant Counsel Billy Young represented the Department.

### **ISSUE**

The Taxpayer worked as an independent contractor insurance adjustor and lived in Seale, Alabama during the years in issue. He contracted to do work for various companies in Florida, Georgia, and Kentucky during those years. The issue is whether the Taxpayer can deduct his business-related travel and related expenses incurred outside of Alabama in the years. That issue turns on whether the Taxpayer's work outside of Alabama was "temporary" in nature, in which case the expenses are deductible, or "indefinite" in nature, in which case the expenses are nondeductible.

### **FACTS**

The Taxpayer has worked as an independent insurance adjustor since at least the 1970's. In May 2002, McCloud Claim Service contacted the Taxpayer about working on claims resulting from a hail storm that hit Lebanon, Kentucky on May 1, 2002. The Taxpayer accepted the job and worked in the Lebanon area from May until November 2002. McCloud asked the Taxpayer in November 2002 to work some claims in Bowling Green, Kentucky. The Taxpayer consequently moved to Bowling Green in November 2002, and worked there until February 2004.

The Taxpayer moved back to Alabama in February 2004 and did odd jobs until August 2004, when Hurricane Charlie hit Florida. Pilot Catastrophe contracted with the Taxpayer at that time to work claims in the Port Charlotte, Florida area. The Taxpayer moved to Florida in August or September 2004, and stayed until late February or early March 2005, when he returned to Alabama.

In late March 2005, Independent Adjusters, Inc. contracted with the Taxpayer to work storm claims in North Georgia. The Taxpayer worked in North Georgia until November or December 2005, when the job ended and he returned to Alabama.

### **ANALYSIS**

Code of Ala. 1975, §40-18-15(a)(1) allows all individuals to deduct ordinary and necessary business expenses to the same extent allowed by 26 U.S.C. §162. Section 162(a)(2) allows individuals to deduct business-related travel expenses, including reasonable amounts for meals and lodging. To be deductible, however, the business trip away from home must be temporary in nature, and not indefinite. The temporary versus indefinite test is succinctly explained in the CCH Master Tax Guide, as follows:

Temporary v. Indefinite Test. In determining when an individual is “away from home,” the nature of the stay and the length of time away from the individual’s principal place of business are of prime importance. If the assignment is *temporary* in nature, the taxpayer is considered “away from home” and a traveling expense deduction is allowed. If the assignment is for an *indefinite* period of time, the location of the assignment becomes the individual’s new “tax home,” and the individual may not deduct traveling expenses while there. When an individual works away from home, at a single location, for more than one year, the employment will be treated as indefinite and related travel expense will not be deductible. (Code Sec. 162(a)). Employment expected to last more than one year is classified as indefinite, regardless of whether the work actually exceeds a year (Rev. Rul. 93-86). Employment that is expected to and does last for one year or less is temporary (Rev. Rul. 99-7).

The U.S. District Court in *Dahood v. United States*, 585 F.Supp. 93, also addressed the issue, as follows:

To qualify as “temporary”, the employment of the taxpayer must be that which is foreseeable for a short period of time or for a fixed duration. *Boone v. United States*, 482 F.2d 417, 419 (5<sup>th</sup> Cir. 1975). 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 (7<sup>th</sup> Cir. 1982). And 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, supra*, 671 F.2d at 1061 (and authorities therein cited).

*Dahood*, 585 F.Supp. at 96.

The Taxpayer explained in this case that when he took the jobs in Florida, Kentucky, and Georgia in the subject years, he believed, based on his past experiences, that the jobs would last only a few months, and certainly not over a year.

The Taxpayer’s job in Lebanon, Kentucky lasted from May until November 2002. That six month assignment was temporary in nature, and thus was “away from home” for purposes of the §162(a)(2) deduction. The expenses relating to that job should be allowed.

The Taxpayer worked in Bowling Green, Kentucky from November 2002 until February 2004. The Taxpayer did not anticipate working in Bowling Green that long, but as stated in *Dahood*, “employment which was temporary at inception may become indefinite if it extends beyond the short term.” *Dahood*, 585 F.Supp. at 96. Consequently, because the Taxpayer’s work in Bowling Green lasted more than a year,

the expenses relating to that work assignment cannot be deducted.

The Taxpayer's job assignments in Florida and Georgia lasted less than one year. He stayed in Florida from August 2004 until March 2005, and in Georgia from March 2005 until December 2005. The travel expenses relating to those "temporary" jobs should also be allowed.

The Department acknowledged at the September 18 hearing that the Taxpayer had records verifying at least some of the deductions that had been disallowed. The Taxpayer also agreed to return the records to the Department examiner for review. The examiner should contact the Taxpayer in due course and arrange a meeting. The Taxpayer should provide and, if necessary, explain the records to the examiner. The Department should notify the Administrative Law Division in due course of the adjusted amounts due in the subject years. An appropriate Final Order will then be entered.

This Opinion and Preliminary Order is not an appealable Order. The Final Order on Taxpayer's Second Application for Rehearing, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered October 10, 2012.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Warren W. Young, Esq.  
Eugene B. Malone  
Brenda Lausane