

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

JOHN MARSHALL AND ELAINE B. JONES
Route D, Box 1A
Evergreen, AL 36401,

Taxpayers.

§ STATE OF ALABAMA
DEPARTMENT OF REVENUE
§ ADMINISTRATIVE LAW DIVISION

§ DOCKET NO. INC. 89-246

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FINAL ORDER

The Revenue Department assessed John Marshall and Elaine B. Jones (together "Taxpayers") for income tax for the years 1985 through 1987. The Taxpayers appealed to the Administrative Law Division and a hearing was conducted on January 24, 1994. The Taxpayers appeared at the hearing. Assistant counsel Gwen Garner represented the Department.

The issue in this case is whether various travel, meal, and lodging expenses incurred by John Marshall Jones (individually "Taxpayer") while assigned to various job sites by his employer can be deducted as ordinary and necessary employee business expenses.

The facts are undisputed.

The Taxpayer and his wife have lived in Evergreen, Alabama for more than 25 years. The Taxpayer was employed as a construction job superintendent during the years in issue by a construction company headquartered in Mississippi.

During the subject years, the Taxpayer was assigned by the his employer to various construction jobs in Alabama, Georgia, Texas, Mississippi and South Carolina. The jobs lasted anywhere from two

or three months up to fourteen months. As each construction project was completed, the Taxpayer was assigned to another project by his employer.

The Taxpayer deducted on his 1985, 1986 and 1987 Alabama returns the meals, lodging and travel expenses incurred while away from home working on the construction projects. The Department denied the deductions based on its stated position "that the Taxpayer's job with ATCC-JESCO of Tupelo, Mississippi is an indefinite job location and not a temporary one, therefore, the business expense deductions for going to and from place of employment, meals and lodgings are not deductible." See page 1 of Department's Answer.

Unreimbursed travel, meal and lodging expenses incurred by an employee can be deducted as ordinary and necessary business expenses pursuant to Code of Ala. 1975, §40-18-15(1). That section is modeled after the federal business expense deduction found at 26 U.S.C. §162. Consequently, federal case law and interpretations should be followed in construing the Alabama statute. Best v. State, Dept. of Revenue, 417 So.2d 197 (1981).

Employee business expenses can be deducted only if incurred by the employee away from his tax home. An employee's "tax home" is defined in Department Reg. 810-3-15-10(1)(b)1. as the place where his business activities are centered or he spends most of his working time, or the place where he reports to or receives

instructions from his employer. If a taxpayer has no regular place of business, his tax home is considered to be his regular abode. Rev. Rul. 73-529 and Rev. Rul. 60-189.

In this case, the Taxpayer's tax home was either his employer's headquarters in Mississippi or his residence in Evergreen. In either case, he was away from his tax home when he traveled to and worked at the various job assignments throughout the Southeast during the years in question.

However, if an employee's assignment away from home is indefinite in nature as opposed to temporary, the employee is considered to have changed tax homes to the assignment location.

If so, the expenses incurred at the indefinite or permanent job site cannot be deducted.

Employment is temporary in nature if its termination can be foreseen within a reasonably short period of time. Dahood v. U.S., 585 F.Supp. 93. If the employment lasts less than a year, there is no presumption that it is either temporary or permanent. If the employment lasts for more than one year, it is presumed to be indefinite, but that assumption can be rebutted depending on the facts of the case. The test is whether it is reasonable to expect the employee to move his permanent residence to the job site, and also, does the employee have a reasonable prospect for continued employment at the job site. Walraven v. C.I.R., 815 F.2d 1246.

In this case, the Taxpayer did not expect to remain at each job site for more than the few months necessary to complete the project. It would also have been unreasonable for the Taxpayer to establish a permanent residence at each of the job locations. The job assignments were thus temporary in nature and not indefinite. Consequently, the Taxpayer's ordinary and necessary expenses relating to the job assignments can be deducted.

The above considered, the assessments in issue are voided and the employee expenses claimed on the Taxpayers' returns should be accepted as filed.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on February 7, 1994.

BILL THOMPSON
Chief Administrative Law Judge

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