BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

DUSTIN ROBISON, Appellant, -v- THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	)	DOCKET NO.: IT-2010-2 FACTUAL BACKGROUND, CONCLUSIONS OF LAW, ORDER AND OPPORTUNITY FOR JUDICIAL REVIEW

STATEMENT OF CASE

This matter comes before the State Tax Appeal Board (Board) for administrative review of the Final Agency Decision and Order entered by the Montana Department of Revenue (DOR) pursuant to §15-2-301, MCA. Dustin Robison (Taxpayer) requests review and reversal of the DOR final determination disallowing the employee business expenses for tax years 2005 through 2008. The Board set the appeal as an informal proceeding on the record pursuant to §2-4-604, MCA, without objection by the parties.

FACTUAL HISTORY

The following history was derived from the DOR's answer to the Board and the Department of Revenue's Office of Dispute Resolution Findings of Fact and Conclusions of Law, which is considered the final agency action. There were no contested facts in this matter.

The Taxpayer was employed as an oil rig worker in the Big Piney/Pinedale area of Wyoming during the majority of the tax years at issue. Throughout the audit

period, he filed Montana Individual Income Tax Returns as a full-year resident of Montana, reporting a home address in Billings.

The Taxpayer maintained mileage logs reporting a total of 168,236 miles for the tax years at issue and thus claiming employee business expenses in the amount of $78,812.

The audit in this matter involved a random selection of returns reporting significant amounts of unreimbursed employee business expenses claimed for extended periods. The DOR audited the Taxpayer's tax returns for years 2005 through 2008, and subsequently disallowed the employee business expenses for those tax years. The audit and subsequent tax liability determination focused on the fact the Department determined that Appellant's tax home being in the Big Piney/Pinedale area for the time that he worked there from 2005 through much of 2008. The audit also noted, "Generally your tax home is your regular place of business or post of duty, regardless of where you maintain your family home. It includes the entire city or general area in which your business or work is located." When the Department determined that Appellant's "tax home" was the Big Piney/Pinedale area, his mileage was deemed a non-deductible commuting expense[1].

The Taxpayer pursued the appeal procedures available within the Department: an informal review and a proceeding before the Office of Dispute Resolution (ODR). The audit results were affirmed at each of these steps. ODR Hearing Examiner's Findings of Fact and Conclusions of Law were adopted as the final decision of the DOR on July 26, 2010. On August 11, 2010, the Taxpayer appealed the Department's final decision to this Board, which heard this matter as an informal proceeding (without objection) on the record with an opportunity for the parties to submit evidence. Neither party submitted additional evidence or briefing.

[1] We note that the DOR did not further conclude that the Taxpayer was therefore a resident of Wyoming for tax purposes and refund his Montana income taxes for the years in question, despite the language of §15-30-2101(28) which defines a resident for tax purposes as one who has not established a residence elsewhere.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND BOARD DISCUSSION

The State Tax Appeal Board has jurisdiction over this matter pursuant to §15-2-302, MCA. Neither party contested the facts presented by the Department in its final order, and after review of the file, we note that the issue presented is of statutory interpretation. Thus, we hereby incorporate the materials submitted to the Department and the Office of Dispute Resolution and the transcript of the ODR's proceedings as part of the evidence in this matter. We also discuss our specific findings of fact below, as needed.

The question at issue is whether the Taxpayer may deduct certain business expenses from his income for tax purposes. The Taxpayer argues that federal and state law allows a deduction for travel expenses when traveling away from home to temporary job sites. He also argues the tax law is written in a way that is unclear, misleading and can be interpreted in a number of different ways, and thus the department's interpretation of federal statute should be disallowed. We agree that the law in this particular situation is unclear, subject to a variety of interpretations, and has conflicting case law interpreting its provisions. As a starting point, therefore, we look to the law itself and the rationale behind it.

Montana law in this case incorporates federal law[2], so the Internal Revenue Code, 26 U.S.C. 162(a)(2), is the authority for determining what deductions are allowed as business expenses:

> (a) In general. There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,. . .(2) including traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit

[2] Sections 15-30-2110, MCA, and 15-30-2131, MCA, define adjusted gross income and net income by reference to the Internal Revenue Code.

> of a trade or business; (3). . . For purposes of paragraph (2), the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year.

The ordinary and necessary expenses of conducting a business are deductible under §162 because the goal of the tax code is to tax net income, not gross income. To do this requires the deduction of the cost of goods and materials as well as the cost of carrying on the business, which includes travel. Thus, §162 is intended to ease the burden of the business traveler who maintains a place of residence , the expenses of which are non-deductible, and works at another place incurring duplicative living expenses. *See, e,g., Brown v. Comm'r*, 13 B.T.A. 832, 834 (1928). The travel deduction has given rise to a great deal of litigation over the years because the expenses of commuting from home to work are considered personal expenses under 26 U.S.C. 262 and therefore not deductible. Distinguishing business travel from personal travel has produced an enormous body of inconsistent case law.

The U.S. Supreme Court decided *Comm'r v. Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, in 1946 which set out the three-point test that begins the controversy. The costs of travel are deductible only if (1) the expense is reasonable and necessary, (2) the expense is incurred while away from home, and (3) the expense is incurred in the pursuit of business. As a result, Mr. Flowers, who chose to keep his home in Jackson, Mississippi, after obtaining employment that required him to be in Mobile, Alabama, at least part of the year, was denied a deduction for the expenses of his travel because they were not necessary to the pursuit of his employer's business. In other, words, his staying in Jackson was deemed a personal preference rather than a business necessity. The court did not define the second requirement, that the expenses be incurred while away from home. In fact, despite several Supreme Court decisions on the subject, the Court has never really defined "home" for tax purposes. See *Comm'r v. Stidger*, 386 U.S. 287, 292 (1967), *Peurifoy v. Comm'r*, 358 U.S. 59, 60 (1958).

The Internal Revenue Service developed a rule, generally upheld by the U.S. Tax Court, that the word "home" means business home under the assumption that taxpayers will generally live near their place of work, and failure to move is a personal choice, as it was in *Flowers.* Thus, the IRS considers a taxpayer's place of business to be a taxpayer's tax home[3]. Obviously, this is a rule that simplifies the administration of the tax law but it is worth noting that there is no statutory authority for that definition, the Supreme Court has not upheld it and not all lower courts have agreed with it. Specifically, the rule in the Ninth Circuit, which governs our appeals, treats the taxpayer's home as the tax home. *Wallace v. Comm'r,* 144 F.2d 407, 411 (9th Cir 1944), *Coombs v. Comm'r*, 608 F.2d 1269, 1274(9th Cir 1979).

Before we look to determine the Taxpayer's "home" for tax purposes, we will review whether the Taxpayer's employment is considered temporary under the tax laws. The issue of the tax home location is critical when the taxpayer has a temporary assignment because federal statute sets out a bright-line test for determining whether certain costs are deductible. The determination of whether a job is temporary is a fact issue. *Peurifoy v. C.I.R.,* 358 US 59, 61 (1985). The case law has developed a test that looks at the reasonable anticipation of long or short term assignment, with one year being the dividing line between a temporary assignment and an indefinite one. See *Kasun v. US,* 671 F. 2d 1059 (7th Cir 1982) and *Neal v. U.S.,* 681 F. 2d 1159 (adopting *Kasun* as the law of the 9th Circuit.)

While the statute seems to make a bright-line distinction of temporary employment lasting less than one year, the case law and subsequent revenue rulings have instead focused on the length of time anticipated, rather than just the actual time at one location. For example, the Revenue Ruling 93-86 states the IRS current position:

[3] Rev. Rul. 60-189, Rev. Rul. 73-529 and Rev. Rul. 83-82

> Accordingly, if employment away from home in a single location is realistically expected to last (and does in fact last) for 1 year or less, the employment will be treated as temporary in the absence of facts and circumstances indicating otherwise. If employment away from home in a single location is realistically expected to last for more than 1 year or there is no realistic expectation that the employment will last for 1 year or less, the employment will be treated as indefinite, regardless of whether it actually exceeds 1 year. **If employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes.** (emphasis added)

The emphasis is on what length of time the taxpayer reasonably anticipated the job would place him in one location, and not whether the court determines it was reasonable to move his home. *DeVincent v. CIR*, 1991 U.S. App LEXIS 590 (9th Cir).

Determining what the Taxpayer might have reasonably thought is generally a complicated issue for the trier of fact, but in this case we find there is clear and ample evidence. We find the Taxpayer's evidence compelling in determining that, at all times, his employment was temporary. The Taxpayer's uncontroverted testimony was that he never knew how long he would be employed at any one site. The nature of his work on oil drilling rigs was, by definition, temporary. He stated, "Oil rigs are designed to move. That's the principle that allows us to do what we do. We rig up on a location. Once our hole is drilled, we have to move to the next one. No telling where that will be." [4] He further stated that living in Billings was a good choice as it was central to several oil fields.

He submitted letters from his drilling superintendent, John E. Smith, as additional proof of the temporary nature of his employment at a specific site. Mr. Smith stated: "We, at Unit Drilling Company, cannot guarantee where our employees will be working from one month to the next. We have rigs in 5 states, and from time

[4] Transcript, p. 4

to time, transfer people as needed. . . . We have rigs that can be in a certain area for one month or a few years at a time. . . . We do not recommend anyone moving to a new area every time a rig moves. We have dozens of people working in other states. Some are traveling 1,000 miles or so from their homes. It is not feasible at any time to move to a new area just because our rig moved there. The job could end at any time."[5]

The Department of Revenue does not contest the lack of permanency of Taxpayer's job site but argues that once the Taxpayer was located in Wyoming for over a year of employment, no deductions for travel could be made. When the work in Wyoming ended, Taxpayer was transferred to work in three different states, Utah, North Dakota and Oklahoma, in the three remaining months of that year. The DOR is not disputing those expenses, only the ones while he worked in Wyoming, so they acknowledge the temporary nature of his work but hold his tax home moved to Wyoming during his work there.

We find that the Taxpayer was not located in Wyoming for over a year, but actually made numerous seven-day temporary business trips to Wyoming. Clearly the uncontroverted evidence demonstrates taxpayer's work locations were temporary, even during his three-plus years in Wyoming. His employer's work records indicate that he worked at approximately ten different locations in Wyoming.[6] His testimony indicates he was assigned to different employer-provided lodgings ("man camps") during his employment which generally required that he drive more than 50 miles from man camp to the work site. His employer discourages employees from staying in the area and plans the work schedule so that each work crew has seven days work and then seven days off, so that employees can travel home and maintain some degree of family life. In fact, employees are required to vacate the man camps because another

[5] Letter of John E. Smith, Dec. 18, 2009.
[6] Company work logs submitted by H&R Block to Mark Simonsen on 9/24/09 and 10/12/09, pages unnumbered.

crew moves in for the next seven days. Those employees are not allowed to keep any personal items at man camp on the "off week." The Taxpayer received a food allowance from his employer during his week at work but not the week off work when he was at home. During half the time he was working in Wyoming, therefore, Mr. Robison had no place to stay and no work assignments, making it clear this was not a "home," tax or otherwise. He was clearly expected to return to his actual home. The record is unclear as to his employment status during those weeks but the work records make it appear he was paid only for the hours he actually worked on the rig.

We find that the duration of the work was always uncertain as there was no guarantee Mr. Robison would be called back to work at the next location. He does not have a contract or promise of ongoing employment. Even though Mr. Robison was employed by the same company during this time, the nature of the work means that the company cannot predict its labor needs or location with any certainty. Clearly, there was nothing the taxpayer could do to shorten his driving in that he was told not to move to Wyoming by his employer and he had no idea how long each location would provide employment. We find this is a work pattern that includes a degree of uncertainty not contemplated in any of the Revenue Rulings or cases we have found.

The tax code limits temporary business stays to one year in 26 U.S.C. §162 (a)(3). This amendment was added by §1938 of the Energy Policy Act of 1992, Pub.L. No. 102-486, in an effort to discourage gasoline consumption. The result is that business travel expenses become non-deductible after one year of work in a single location. The clear assumption of the statute is that the taxpayer can move to follow his work, which is not the case here[7]. In temporary relocation cases, the employee generally takes temporary quarters and remains in that locale for the duration of the

[7] Interestingly, that amendment carves out an exception for federal employees who have temporary relocations in the course of federal crime investigations and trials (26 U.S.C. 162(a)(3)), which can require a unpredictable temporary stay of a week or several years, a work pattern very analogous to our case.

task. Mr. Robison was even more temporary than that, which raises the question whether this really was a business stay within the contemplation of the statutory limit or Revenue Rulings. Mr. Robison did not and could not establish an abode or even temporary housing in Wyoming as he was forced to leave his temporary quarters every seven days. To conclude that he established a home in western Wyoming simply because he travelled weekly to a number of different drill sites in that part of the state strains even the IRS "tax home" rule beyond a reasonable interpretation. Each week he travelled to an assigned job site, taking his necessary belongings with him, like any other business traveler on a one-week trip. The same management that sent him to three different states in three months at the end of 2008 happened to send him to ten different sites in the same 250 square-mile area of Wyoming during the years at issue. We find that this was not a temporary relocation within the meaning of 26 U.S.C. 162 (a)(3) but a series of business trips, the expenses of which should be deductible.

We now revisit the question of Taxpayer's "home" for tax purposes. The question of "where one's 'home' is for tax purposes is essentially a question of fact." *Frank v. U.S.,* 577 F.2d 93, 97 (9th Cir 1978)(citing *Curtis v. Comm'r,* 449 F.2d 225, 227 (5th Cir 1971) "Therefore, the question of fact referred to in *Frank* and *Curtis* is: of all the taxpayer's 'abodes,' which is at his principal place of business or employment? If the taxpayer has only one abode, we are presented with no question of fact as to this issue." *Coombs,* 608 F.2d at 1274. In *Wright v. Hartsell*, 305 F.2d 221 (9th Cir 1962), the Court concluded that "a taxpayer's inability to live near his job site is a valid ground for deduction as travel expense of the resulting cost of his transportation, food and lodging." Id at 225. The Ninth Circuit has, therefore, acknowledged that if the taxpayer has a second place of abode near a place of business, then there is a fact question as to which is the principal place of business, but if there is only one abode that is the taxpayer's tax home. The facts presented make it clear that is our case here.

Based on the evidence presented, we find that Mr. Robison never established an abode in Wyoming.

Looking at all the facts and circumstances, and considering the intent of the statute, we find that his employment in Wyoming was temporary in nature under the test announced in Rev. Rul. 93-86 and that Mr. Robison did not have a tax home in Wyoming during that time. His only home was in Billings and he had a valid business reason for maintaining his home in Billings as it was central to a number of oil fields. Therefore, the travel expenses he incurred in driving to and from Wyoming are properly deductible.

On a separate note, Mr. Robison testified that he tried to do everything to comply with the law, had professionals prepare his tax returns, and was unaware of any rules that would limit the deductibility of his business expenses. Our analysis of the rules and law on this particular issue confirm that the issue produces unpredictable outcomes. Because the law is unclear, and can be subject to multiple interpretations, we conclude that even were we to disallow the travel deductions, this case is not an appropriate one for the imposition of penalties and interest.

ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the travel deductions disallowed by the Department are hereby allowed.

Dated this 2nd day of February, 2011.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/s/_____
KAREN E. POWELL, Chairwoman

/s/_____
DOUGLAS A. KAERCHER, Board Member

/s/_____
SAMANTHA SANCHEZ, Board Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2ND day of February, 2011, a true and correct copy of the foregoing has been served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Dustin Robison 2345 Anna Drive Billings, Montana 59106	__x__U.S. Mail ____Hand delivered ____E-Mail ____Telecopy
Office of Legal Affairs Department of Revenue Mitchell Building PO Box 7701 Helena, Montana 59604-7701	____U.S. Mail ____Hand delivered __x__Interoffice delivery ____E-Mail ____Telecopy

/s/_____
DONNA EUBANK
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