STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of MICHAEL L. COYLE for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1982 through 1984.	:	DECISION DTA NO. 803377

Petitioner, Michael L. Coyle, 19 Oakhurst Road, Buffalo, New York 14220, filed an exception to the determination of the Administrative Law Judge issued on June 30, 1988 with respect to his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 through 1984 (File No. 803377). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

No briefs were filed on exception. Petitioner's request for oral argument was denied and oral argument was therefore not heard.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly determined that petitioner's employment during the period June 18, 1982 through July 25, 1984 was of an indefinite nature, rather than temporary, and thereby properly disallowed certain travel expenses claimed by petitioner during the years at issue.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts are restated below.

On April 11, 1986, the Division of Taxation issued a Notice of Deficiency to petitioner, Michael L. Coyle, asserting additional personal income tax due of $1,562.00, plus interest, for the years 1982, 1983 and 1984.

The deficiency herein resulted from the Division's disallowance of employee business expenses claimed by petitioner for each of the years at issue in amounts as follows:

Year	Amount Disallowed	Resulting Deficiency
1982	$5,509.00	$560.00
1983	5,778.00	578.00
1984	4,226.00	424.00

Petitioner makes his living as a welder. At all times relevant herein he was a member of Steamfitter's Local 395 located in Buffalo, New York. In March 1982 petitioner was laid off from his Buffalo-area job. Petitioner was, at that time, unable to find work in the Buffalo area. He subsequently found work at the construction of the Nine Mile Two Plant in Oswego, New York, where he was employed by ITT Grinnell Industrial Piping, Inc. He worked for ITT Grinnell in Oswego from June 18, 1982 through July 25, 1984.

The Nine Mile Two job was a major construction project which, by 1982, had been in progress for a number of years. At hearing, petitioner estimated that he could have continued to work in Oswego on the Nine Mile Two job for an additional three or four years.

Prior to his employment in Oswego, petitioner caused his name to be placed on the "out-of-work list" at Local 395. As employment opportunities arose, individuals on the list were contacted by the Local and were advised of the employment opportunity. At the time he caused his name to be placed on the list in March 1982, it was petitioner's intention to find work in the Buffalo area.

Following his employment in Oswego, it remained petitioner's intention to return to the Buffalo area at the first opportunity; that is, as soon as work became available in the Buffalo area.

Petitioner's lack of a job in March 1982 was brought about by the general condition of the Western New York economy. Consequently, at the time he accepted employment in Oswego in June 1982, he had no idea as to when economic conditions would improve and thereby allow him to find work in the Buffalo area.

While he was working at the Nine Mile Two plant, petitioner lived in an apartment in the Oswego area. Petitioner's wife and children continued to reside at their home in Buffalo. Petitioner continued to pay the costs of maintaining his Buffalo home. Petitioner returned to his home in Buffalo on weekends during his Oswego employment period. Petitioner's wife continued to work in Buffalo.

The disallowed employee business expenses herein were costs to petitioner of traveling between Oswego and his home in Buffalo; rent paid for his apartment in Oswego; and petitioner's meals in Oswego. The amounts of the expenses are not in dispute.

Given the state of the economy in Western New York during the period at issue, petitioner was not contacted by his Local regarding an employment opportunity in the Buffalo area until 1984. Upon learning of the employment opportunity in Buffalo, petitioner discontinued his employment in Oswego and returned home to Buffalo.

OPINION

The Administrative Law Judge determined that petitioner was liable for the personal income tax deficiency assessed by the Division of Taxation for the years 1982, 1983 and 1984 because petitioner failed to establish that his employment was temporary and not indefinite in nature. The deficiencies arose as a result of the disallowance by the Division of certain travel expenses claimed by the petitioner who, relying on section 162(a)(2) of the Internal Revenue Code, deducted these costs each year for the years at issue.

Petitioner filed an exception to the determination on the grounds that his employment in Oswego was indeed of a temporary nature. Petitioner asserts that throughout the years in issue he maintained the requisite ties with his home and at no time entertained the thought of relocating his family from Buffalo to Oswego. This, petitioner reasons, was due to the fact that he anticipated an employment opportunity in Buffalo to become available at some point in the future.

We affirm the determination of the Administrative Law Judge.

It is first imperative to discuss the authority of the Division in regard to its interpretation of Federal tax law. According to section 162(a)(2) of the Internal Revenue Code, certain travel expenses incurred by the taxpayer during the course of trade or business may be deducted if the amount deducted is found to be reasonable and, if the expenses were incurred while petitioner is found to be away from home.

For the period in issue, former Tax Law section 615(a) defined the New York itemized deduction of a resident individual as follows:

> "(a) General. If federal taxable income of a resident individual is determined by itemizing deductions from his federal adjusted gross income, he may elect to deduct his New York itemized deduction in lieu of his New York standard deduction. The New York itemized deduction of a resident individual means the total amount of his deductions from federal adjusted gross income, other than federal deductions for personal exemptions, as provided in the laws of the United States for the taxable year, with the modifications specified in this section."

Therefore, although the Administrative Law Judge dealt directly with section 162 of the Internal Revenue Code, the deduction provided by this section of the Code is incorporated into New York's income tax by section 615(a) of the Tax Law.

Section 162(a) of the Internal Revenue Code reads as follows:

> "(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, including--
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> * * *

> (2) 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 of a trade or business;"

The Division conceded that petitioner's expenses were both reasonable in amount and incurred in connection with petitioner's welding trade. The issue which confronted the Administrative Law Judge and which we now address is whether petitioner's expenses were incurred away from home. The Administrative Law Judge determined that the term "home" for purposes of section 162(a)(2) has been interpreted by the courts to mean the vicinity of the taxpayer's principal place of business. An exception allows a taxpayer to work elsewhere on a temporary basis while continuing to retain his home located in the vicinity of his prior place of employment for purposes of claiming the section 162(a)(2) deduction (see, Barnhill v. Commr., 148 F2d 913, 916; Peurifoy v. Commr., 254 F2d 483, 486, [4th Cir 1957] revg 27 TC 149, cert granted 358 U.S. 59, affd, reh denied; Rev. Rul. 83-82).

What must now be examined is the court's interpretation of the term "temporary", for it is the petitioner's contention that his employment in Oswego during the period June 18, 1982 through July 25, 1984 was, by virtue of his intent and his actions, temporary in nature.

The courts have held that temporary employment is that which can be expected to last a short period of time (see, Norwood v. Commr., 66 TC 467, 469; McCallister v. Commr., 70 TC 505). A finding that the employment away from home is temporary will allow for the deduction pursuant to section 162(a)(2), whereas employment away from home where termination within a fixed or reasonably short period of time cannot be foreseen will be considered "indefinite". The taxpayer cannot deduct travel expenses incurred while being employed for an indefinite period of time (see, Norwood v. Commr., supra; McCallister v. Commr., supra). The Administrative Law Judge illustrated the distinction between indefinite and temporary by noting the criteria which have been developed by the courts:

> "Relevant considerations include whether the taxpayer had a logical expectation that the employment would last for a short period, an assurance that the job itself would not extend beyond a reasonably brief duration, an inordinate duplication of living expenses, and enough financial, familial, and social bonds to choose prudently to remain at his original residence, rather than uproot his family from their accustomed home and relocate them at the site of his present work." (Holter v. Commr., 37 TCM 1707, 1711.)

Based upon a thorough examination of the record, the Administrative Law Judge determined that in light of case law and the criteria articulated in Holter, supra, the petitioner failed to show that his employment was temporary and not indefinite in nature.

We are sympathetic to the plight of the petitioner in this case who, despite economic conditions beyond his control, did his best to provide for his family. It is obvious from the record that petitioner did not intend his stay in Oswego to be permanent, for he maintained his home in Buffalo and, during the years at issue, returned each weekend in order to visit his family. Even while working in Oswego, petitioner kept his name on a list compiled by his local union of those seeking employment in the Buffalo area.

It is also obvious from the record, however, that petitioner had no concept of when or at what point in the future employment would be available in Buffalo. It is also clear that petitioner's employment in Oswego could reasonably have been expected to last indefinitely. In fact, petitioner testified that "this job here in Oswego, I probably could have stayed on it for another three or four years . . .". In fact, petitioner worked in Oswego for twenty-six months.

In view of the criteria distinguishing temporary employment from indefinite employment, we affirm the determination of the Administrative Law Judge that petitioner was liable for the personal income tax deficiency assessed by the Division for the years at issue (see, Groover v. Commr., 714 F2d 1103; Babeaux v. Commr., 601 F2d 730, revg 36 TCM 657; Nulsen v. Commr., 48 TCM 297; Rev. Rul. 83-82).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Michael L. Coyle is denied; and

2. The determination of the Administrative Law Judge is affirmed.

3. The Notice of Deficiency, dated April 11, 1986, is sustained.

Dated: Albany, New York
January 20, 1989

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner