STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH A. HELNARSKI	:	DECISION
For Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1983 and 1984.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on February 8, 1990 with respect to a petition of Joseph A. Helnarski, 15777 Bolesta Road, Clearwater, Florida 33520 for a redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1983 and 1984 (File No. 805087). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a letter in lieu of a brief. The Division filed a brief.

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

ISSUE

Whether the Administrative Law Judge properly determined that petitioner's employment during the years at issue was of a temporary nature rather than indefinite, and thereby properly allowed certain travel expenses claimed by petitioner.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that finding of fact "4" has been modified as indicated below.

On January 15, 1987, the Division of Taxation issued a Notice of Deficiency to petitioner, Joseph A. Helnarski, asserting personal income tax due of $2,191.48, plus interest, for the years 1983 and 1984.

The tax deficiency 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	Employee Business Expenses Disallowed	Resulting Income Tax Deficiency
1983	$13,565.00	$1,402.05
1984	$ 7,868.00	$ 789.43

Petitioner made his living as a plumber/welder/pipe fitter for approximately 23 years, during which time he was a member of the United Association of Plumbers and Pipe Fitters Local No. 105, located in Schenectady, New York. During the time of his union membership, petitioner periodically was unable to find employment in the Albany-Troy-Schenectady region and consequently was referred to union locals in other localities. Petitioner worked on construction projects in the Playboy Club in Atlantic City, New Jersey; at the Pilgrim Nuclear Power Plant in Plymouth, Massachusetts; and in various other states and localities.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> In January 1982, petitioner could not find work in the Capital Region. Consequently, he was referred by his union local to the jurisdiction of Local 273, Oswego, New York. He was hired by E. H. Hind to work at the Fitzpatrick Nuclear Power Project near Oswego, New York. The plant was shut down for repairs at this time. This employment continued through March 1982 and ceased when the employer completed its repair job. In April 1982, petitioner began working at the Nine Mile Two Nuclear Power Plant, also located in Oswego, New York. His employer was ITT Grinnell Industrial Piping, Inc., a contractor on the nuclear construction project. When he was hired, petitioner was uncertain as to how long he would be employed in Oswego. In fact, he was employed by ITT Grinnell from April 1982, until he was laid off in the middle of March 1983. In the beginning of April 1983, petitioner was rehired by ITT Grinnell and continued working for this employer until August 5, 1984, when petitioner was laid off once again. Petitioner was again employed by E. H. Hind from mid-

August 1984 through December 1984 at the Fitzpatrick Nuclear Power Project. It is not known when his employment with E. H. Hind finally terminated.[1]

Petitioner is a longtime resident of Mechanicville, New York. He lived in the same house in Mechanicville for 37 years. When he first began working in the Oswego area, petitioner stayed in the Evergreen Motel in Oswego, New York. Beginning the week of January 19, 1983, petitioner rented an apartment in Oswego which he shared with another worker. His rent was $200.00 per month. Petitioner returned home to Mechanicville, New York on Saturday nights and returned to Oswego on Sundays. Petitioner's wife and daughter continued to live at their home in Mechanicville during the entire period petitioner was employed in the Oswego area. His daughter attended local schools and colleges in the Mechanicville area.

During his employment at Nine Mile Two, petitioner suffered from an illness at first thought to be a stroke or heart attack. He was hospitalized in Oswego and later returned to his home in Mechanicville and was treated at the Leonard Hospital in Troy, New York.

Petitioner obtained work through his union local. Union members were not allowed to get work on their own. To work in Oswego, an area outside the jurisdiction of petitioner's local,

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[1] Finding of fact "4" of the Administrative Law Judge's determination read as follows:

> "In January 1982, petitioner could not find work in the Capital Region. Consequently, he was referred by his union local to the jurisdiction of Local 273, Oswego, New York. He was assigned to work for E. H. Hinds at the Fitzpatrick Nuclear Power Project near Oswego, New York. The plant was shut down for repairs at this time. This employment continued through March 1982. In April 1982, petitioner began working at the Nine Mile Two Nuclear Power Plant, also located in Oswego, New York. His employer was ITT Grinnell Industrial Piping, Inc., a contractor on the nuclear construction project. When he was hired, petitioner was uncertain as to how long he would be employed in Oswego. In fact, he was employed by ITT Grinnell steadily from April 1982 through August 5, 1984, with a two-week break in employment at the end of March 1983. Petitioner was again employed by E. H. Hind from mid-August 1984 through December 1984 at the Fitzpatrick Nuclear Power Project. It is not known when his employment with E. H. Hind finally terminated."

We modified finding of fact "4" to reflect the record in more detail.

petitioner was required to obtain a travel card from his local authorizing him to work in the Oswego area.

Petitioner submitted a letter from his union business representative stating that petitioner was referred temporarily during the period January 1983 through August 1984 to work in the jurisdiction of Local 273, Oswego, New York.

It is noted that the Fitzpatrick Nuclear Power Project is operated by the New York Power Authority. The Nine Mile Point Two nuclear project is operated by Niagara Mohawk Power Company.

OPINION

In the determination below, the Administrative Law Judge found that the travel expenses incurred by petitioner were incurred while away from home so as to be deductible business expenses under § 162(a)(2) of the Internal Revenue Code.[2] In evaluating the facts, the Administrative Law Judge found that based on the actual length of petitioner's employment with ITT Grinnell, his logical expectations regarding his employment situation, and his strong ties to his longtime residence in Mechanicville, petitioner reasonably chose to treat Mechanicville as his home. Accordingly, the living expenses incurred by petitioner while working in Oswego were compelled by the exigencies of business and were deductible.

On exception, the Division asserts that petitioner has not shown that his employment in Oswego was temporary in nature, rather than indefinite. Furthermore, the Division asserts that petitioner's employment in excess of two years supports an inference that petitioner was employed indefinitely in Oswego. Accordingly, the Division concludes that petitioner has failed to establish that he was entitled to claim employee business expense deductions for his employment in Oswego during the tax years 1983 and 1984.

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[2]The deduction provided by this section of the Code is incorporated into New York's income tax by § 615(a) of the Tax Law.

In response, the petitioner asserts that his employment was temporary in nature, and thus, he is entitled to claim the business expense deductions incurred by him during the tax years in question.

We affirm the determination of the Administrative Law Judge.

Section 162(a)(2) of the Internal Revenue Code provides for a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, 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 of a trade or business; . . ."

There are three conditions that must be satisfied before a traveling expense deduction under § 162(a)(2) may be permitted:

> "(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> "(2) The expense must be incurred 'while away from home'.
>
> "(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade" (Commissioner v. Flowers, 326 US 465).

The first condition is not at issue here. The Division is not disputing the reasonableness of the expenses claimed by petitioner, but rather petitioner's entitlement to deduct such expenses.

"Home" as used in § 162(a)(2) means the taxpayer's permanent abode or residence. Thus, the second condition is met where a taxpayer maintains an actual residence, the expenses of which he continues to incur while away from that residence on business (Rosenspan v. United

States, 438 F2d 905, 71-1 USTC ¶ 9241, cert denied 404 US 864, rehearing denied 404 US 959). To satisfy the business necessity test contained in the third condition, a taxpayer would normally have to demonstrate a direct connection between the expenditure and the carrying on of a trade or business. However, the third condition is met where the taxpayer's employment "away from home" is "temporary" rather than "indefinite" in nature.

> "When an assignment is truly temporary, it would be unreasonable to expect the taxpayer to move his home, and the expenses are thus compelled by the 'exigencies of business'; when the assignment is 'indefinite' or 'indeterminate', the situation is different and, if the taxpayer decides to leave his home where it was, disallowance is appropriate, not because he has acquired a 'tax home' in some lodging house or hotel at the worksite but because his failure to move his home was for his personal convenience and not compelled by business necessity" (Rosenspan v. United States, supra; see also, Six v. United States, 450 F2d 66, 71-2 USTC ¶ 9694).

Whether petitioner's employment was temporary or indefinite is a narrow question of fact upon which petitioner has the burden of proof (Peurifoy v. Commr., 358 US 59, 61, 58-2 USTC ¶ 9925). Based upon a thorough examination of the record, the Administrative Law Judge determined that in light of the case law, and the criteria set forth in Rosenspan, supra, that the petitioner's employment was temporary and not indefinite in nature.

The Division of Taxation urges the adoption of a two-year rule as set forth in Revenue Ruling 83-82 (1983-1 C.B.) which provides:

> "Where a taxpayer anticipates employment to last for less than one year, whether such employment is temporary will be determined on the basis of the facts and circumstances.
>
> "If a taxpayer anticipates employment to last for 1 year or more and that employment does, in fact, last for 1 year or more, there is a presumption that the employment is not temporary but rather is indefinite, and that the taxpayer is not away from home during the indefinite period of employment (see, Rev. Rul. 60-189, C.B. 1960-1, pp. 60, 63). However, under certain circumstances this 1-year presumption of indefiniteness may be rebutted where the employment is expected to, and does, last for 1 year or more, but less than 2 years. An expected or actual stay of 2 years or longer will be considered an indefinite stay, and not a stay away from home, regardless of any other facts or circumstances."

The Division of Taxation urges that a span of employment exceeding two years is not temporary.

We agree with the Administrative Law Judge's analysis. The Administrative Law Judge noted that instead of utilizing a durational test to determine whether petitioner's employment was either temporary or indefinite, the better test to apply is to weigh all relevant facts.

In reviewing all relevant cases, it is apparent that the Federal courts have refused to place a specific time limit upon the length of employment that would automatically result in employment being characterized as indefinite in nature and have recognized that no single element is determinative of the issue of temporariness (see, Norwood v. Commr., 66 T.C 467, 470; see also, Hicks v. Commr., T.C. Memo 1986-255, 51 TCM 1257, 1259). Further, it is recognized that the credibility of the witnesses and the weight to be accorded this testimony is an important factor in determining these cases (see, Six v. United States, supra). As a result, the Tax Court has acknowledged that resolution of this issue is often decided on the unique facts of each case and prior opinions can often provide only minimal guidance (see, Trapp v. Commr., T.C. Memo 1980-49, 39 TCM 1085, 1087; Peurifoy v. Commr., supra).

It is in this context that we decide this case. Here, the Administrative Law Judge found that petitioner expected that his job would be temporary. This expectation was consistent with his past work experience at the Pilgrim Nuclear Power Plant in Massachusetts, and at the Playboy Club in Atlantic City, New Jersey. Furthermore, petitioner continued to maintain strong familial, social and financial bonds to his Mechanicville home.

Given the actual length of his employment with ITT Grinnell and E. H. Hind, the breaks in such employment, petitioner's logical expectations regarding his employment situation, and his strong and long-standing ties to Mechanicville, the Administrative Law Judge concluded that petitioner's employment was temporary in nature (cf., Matter of Coyle, Tax Appeals Tribunal, January 20, 1989 [where the employment was uninterrupted and the petitioner

believed it could continue for another three or four years]). We find no basis to alter her finding. Although the Tax Law provides us with a broad authority to ". . . issue a decision either affirming, reversing or modifying" the determination of the Administrative Law Judge (Tax Law § 2006.7), the regulations adopted by the Tribunal implement this standard of review by providing, in pertinent part, that "the Tribunal shall review the record and shall to the extent necessary or desirable, exercise all power which it could have exercised if it had made the determination" (20 NYCRR 3000.11[e][1], emphasis added). Upon our review of the record, we agree with the Administrative Law Judge's conclusions based on all the evidence and testimony presented to her.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Joseph A. Helnarski is granted; and
4. The Notice of Deficiency dated January 15, 1987, is cancelled.

DATED: Troy, New York
October 11, 1990

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner