STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH A. HELNARSKI	:	DETERMINATION
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.	:	

Petitioner, Joseph A. Helnarski, 15777 Bolesta Road, Clearwater, Florida 33520, filed a petition 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 (File No. 805087).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 17, 1989, with all briefs to be submitted by October 1, 1989. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

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.

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.

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, 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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argued that his employment in Oswego was temporary and that therefore the expenses in question were properly deductible.

The Division argued that since petitioner was employed by ITT Grinnell in Oswego for more than two years, his employment was not temporary in nature, and

the claimed expenses were personal and properly disallowed. The Division raised no issues regarding substantiation of the claimed expenses.

CONCLUSIONS OF LAW

A. Section 162(a)(2) of the Internal Revenue Code[1] provides for a deduction for traveling expenses, including meals and lodging, if reasonable in amount and incurred by a taxpayer in connection with a trade or business, and while "away from home". A taxpayer's "home" for purposes of IRC § 162(a) has generally been held to be the vicinity of his principal place of business (see, e.g., Barnhill v. Commr., 148 F2d 913; Rev. Rul. 60-189). However, in Rosenspan v United States (438 F2d 905, 71-1 USTC 9241, cert denied 404 US 864, rehearing denied 404 US 959), the Second Circuit Court of Appeals explicitly rejected the fiction that one's place of business is one's "tax home" for purposes of section 162(a). Quoting the Supreme Court in Commissioner v. Flowers (326 US 465), the court of appeals held that three conditions must be satisfied before a traveling expense deduction under section 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."

The Rosenspan court further held that "home" as used in section 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, supra). 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 court held that 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).

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[1]The deduction provided by IRC § 162(a)(2) is incorporated into New York's income tax by section 615(a) of the Tax Law.

The Rosenspan doctrine is not inconsistent with case law developed in other circuits which allows a taxpayer having a principal place of employment to go elsewhere to work on a "temporary" basis while retaining as his home for purposes of section 162(a)(2) his prior home located in the vicinity of his prior place of employment (see, e.g., Hazelton v. Commr., 43 TCM 1287). The latter approach places emphasis on the question of whether the employment in question is temporary or indefinite in nature (see, e.g., Walraven v. United States, 815 F2d 1246, 87-1 USTC 9278); while the Rosenspan doctrine shifts the emphasis "from the search for a fictional 'tax home' to a questioning of the business necessity for incurring the expenses away from the taxpayer's permanent residence" (Rosenspan v. United States, supra).

B. Accepting Rosenspan as the law governing this case, the key inquiry which must be made then is whether, under all the circumstances, petitioner's residence in Oswego in 1983 and 1984 may be viewed as temporary in nature or as sufficiently indefinite to expect that a reasonable person in his position would pull up stakes and make his permanent residence in Oswego. (Six v. United States, supra.)

C. Addressing this issue, the Division of Taxation urges the adoption of a two-year rule like the one followed by the Internal Revenue Service. With respect to the issue under discussion, Revenue Ruling 83-82 (1983-1 C.B.) states: "An expected or actual stay of two years or longer will be considered an indefinite stay, and not a stay 'away from home', regardless of any other facts or circumstances." In essense, the Division argues that it is per se unreasonable for a taxpayer to maintain a home in one location when he is employed in a different location for a period longer than two years.

Revenue Rulings represent the IRS interpretation of the application of a particular provision of the Code to a specific set of facts. These rulings carry less weight than Treasury Regulations and are not binding on the courts. The Division has not cited any case in which a court considering the matter has adopted a two-year per se rule. In fact, a review of the relevant cases shows that the Federal courts have resisted adopting any single element as determinative of the ultimate issue of temporariness. In a case almost identical to the instant matter, the court found that a pipe fitter's employment by ITT Grinnell at Nine Mile Island Two from April 26, 1982 through August 5, 1984, a period of 28 months, was temporary in nature and living expenses incurred at the work location were deductible under section 162(a)(2) (Griffin v. Commr., 55 TCM 1025). In Hazelton v. Commr. (43 TCM 1287), a case cited by the Division as consistent with Rev. Rul. 83-82, the court addressed the deductibility of business expenses claimed on the taxpayer's 1978 return. The taxpayer began work at the Palo Verde Nuclear Generating Station in October 1976 and worked there continuously until December 1981. When the taxpayer claimed the 1978 business expenses, he already had been employed at Palo Verde for more than two years and was actually anticipating continuing employment of an indefinite duration. It was in this context that the court stated: "Whatever the status of petitioner's employment in 1976 when he began work at Palo Verde, it is clear that in 1978, it was no longer temporary." This statement cannot be read as an endorsement of Rev. Rul. 83-82. Generally, the courts have rejected a duration test of whatever length (see, e.g., Whitman v. United States, 248 F Supp 845; Norwood v. Commr., 66 TC 467, 470). The better practice, and the one used by the courts, is to weigh all relevant facts.

> "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; see also, Peurifoy v. Commr. 358 US 59, 61, affg per curiam 254 F2d 483, revg 27 TC 149; Matter of Michael Coyle, Tax Appeals

Tribunal, January 20, 1989).

Thus, the inquiry focuses on the nature and duration of the job itself and the reasonableness of the taxpayer's decision to remain at his original residence rather than relocate to the site of his work or business (Griffin v. Commr., supra). Such an inquiry supports the conclusion that petitioner's employment in Oswego was temporary in nature and that he reasonably continued to treat Mechanicville as his home during the periods under discussion. As noted, among the relevant facts to be considered are petitioner's reasonable expectations that his employment would last for a short period. In other words, we must "evaluate those facts available to [petitioner] at a point in time and determine, in light of those facts, whether future employment was for a temporary or indefinite period" (Frederick v. United States, 603 F2d 1292, 1296 [8th Cir 1979]).

Here, there is no evidence in the record that petitioner had any specific expectations as to the length of his employment in Oswego at the time he accepted employment in the Oswego area. He was initially hired by E.H. Hind, in January 1982, to work at the Fitzpatrick Nuclear Power Project. This employment lasted approximately three months. When petitioner was hired by ITT Grinnell in April 1982, he expected that this job would also be temporary. This expectation was consistent with his past work experience at Pilgrim Nuclear Power Plant in Massachusetts and in Atlantic City, New Jersey. Petitioner worked at Nine Mile Two for a continuous period of 27 months when he was laid off by ITT Grinnell. This period of employment stretched from April 1982 through August 5, 1984. He then obtained employment with E.H. Hind, again at the Fitzpatrick project. While Fitzpatrick is located in the Oswego area, there was no continuity of employment here. Fitzpatrick and Nine Mile Two have different operators, and petitioner was employed by different companies. Therefore, petitioner's employment with ITT Grinnell and later with E.H. Hind was not only temporary in contemplation when he accepted it, it was temporary in fact as the employment situation developed (see, Hazelton v. Commr., supra at 1289).

Petitioner shared an apartment with another worker in Oswego throughout 1983 and 1984, but he continued to maintain strong familial, social and financial bonds to his Mechanicville home. His wife and daughter remained in Mechanicville, and he visited there every weekend. Petitioner owned a home in Mechanicville where he lived for 37 years. When he was ill, he returned to Mechanicville for treatment.

Given the actual length of his employment with ITT Grinnell, petitioner's logical expectations regarding his employment situation, and his strong and longstanding ties to Mechanicville, it is concluded that petitioner prudently chose to treat Mechanicville as his home, thus living expenses incurred by petitioner were compelled by the exigencies of business and were deductible.

D. The Division argues that even if petitioner's living expenses in Oswego were reasonable and necessary business expenses incurred while away from home, his expenses to travel between Mechanicville and Oswego were not. In Rosenspan, the court stated: "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" and "such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade" (Rosenspan v. United States, supra). However, as stated above, the Rosenspan opinion held that an expense is compelled by business necessity when it is incurred in connection with a temporary work assignment (see also, Six v. United States, supra).

In Cervilla v. Commr. (35 TCM 775), the Tax Court disallowed the deduction of expenses incurred by a taxpayer who made weekend trips from his place of employment in West Virginia to his home in Ohio since "such trips were simply to visit his family in Ohio. As

such, they are personal not business expenses and must be disallowed." (Id. at 778.) Before making this determination, however, the court concluded that the taxpayer's employment in West Virginia was indefinite rather than temporary and that petitioner was not entitled to deduct any living expenses incurred in connection with his West Virginia employment. Likewise, in Stemkowski v. Commr. (690 F2d 40, 82-2 USTC 9589), the court stated "Stemkowski's 'travel' from Canada, which he claims was home, was clearly not a business necessity but due rather to Stemkowski's personal choice to live in Canada." The court disallowed the claimed travel expenses, but only after finding that Stemkowski's employment in New York was indefinite in nature and disallowing all living expenses incurred by Stemkowski in New York. Here, it has been concluded that petitioner's work assignments were temporary; therefore, all travel expenses incurred in connection with travel from his home to his temporary work assignment must be held to be deductible.

E. The petition of Joseph A. Helnarski is granted, and the Notice of Deficiency dated January 15, 1987, is cancelled.

DATED: Troy, New York
February 8, 1990

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE