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STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ERVIN W. ROSS

For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article(x) 22 of the
Tax Law for the (Year(s) 1970

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 25th day of June , 1974 , she served the within
Notice of Decision (or Determination) by (certified) mail upon Ervin W. Ross

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows:

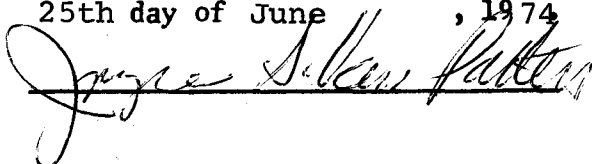
Mr. Ervin W. Ross
Route 11, Box 1150
Fort Meyers, Florida 33901


and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) petitioner herein and that the address set forth on said wrapper is the last
known address of the (representative of the) petitioner.

Sworn to before me this

25th day of June , 1974







STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

STATE TAX COMMISSION

MARIO A. PROCACCINO, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

BUILDING 9, ROOM 214-A
STATE CAMPUS
ALBANY, N.Y. 12227

AREA CODE 518

ADDRESS YOUR REPLY TO

MR. WRIGHT 457-2655
MR. LEISNER 457-2657
MR. COBURN 457-2896

DATED: Albany, New York
June 25, 1974

Mr. Ervin W. Ross
Route 11, Box 1150
Fort Meyers, Florida 33901

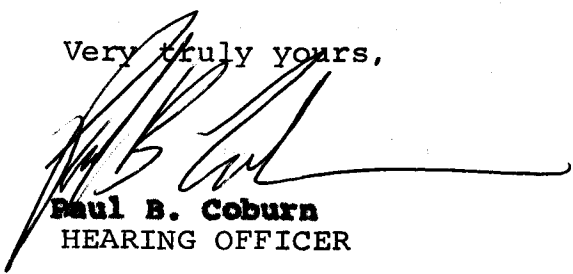
Dear Mr. Ross:

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section (a) **690** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Any inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned.
These will be referred to the proper party for
reply.

Very truly yours,


Paul B. Coburn
HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

AD-1.12 (8/73)

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ERVIN W. ROSS	:	DECISION
for a Redetermination of a Deficiency	:	
or for Refund of Personal Income Tax	:	
under Article 22 of the Tax Law for	:	
the Year 1970.	:	

Petitioner, Ervin W. Ross, has filed a petition for redetermination of deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1970. (File No. 55343361.) A formal hearing was scheduled before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, for October 16, 1973, at 10:45 A.M. Prior to that date, the petitioner waived in writing a formal hearing and submitted the case to the State Tax Commission upon the entire record contained in the file. The State Tax Commission renders the following decision after due consideration of said record.

ISSUE

Was petitioner, Ervin W. Ross, entitled to deductions under section 162(a)(2), I.R.C. 1954 for the year 1970 for amounts expended for meals, lodging and transportation while he was away from Onondaga County, New York?

FINDINGS OF FACT

1. Petitioner, Ervin W. Ross, filed New York State and Federal income tax returns for the year 1970.

2. On November 27, 1972, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Ervin W. Ross, disallowing business expenses claimed by him in his activities as a construction superintendent and adjusting his taxable income by adding monies received from his employer as business expense reimbursement. A Notice of Deficiency was issued in the sum of \$447.73.

3. Petitioner was employed in 1970 by M.A. Bongiovanni, Inc., as a construction superintendent on a highway project, which covered a period of two years, in St. Lawrence County, New York. During that time, he resided in a mobile home which he had purchased on a rented lot near the construction site.

4. There was a winter shutdown over the two-year period of the contract, during which time petitioner resided and worked in Onondaga County, New York.

5. Petitioner expected employment for more than one year.

OPINION

Section 162(a)(2) provides for the deduction of ordinary and necessary business expenses including traveling expenses while away from home in the pursuit of a trade or business. In order to be deductible, traveling expenses must be (1) reasonable and necessary; (2) "incurred 'while away from home'". Commissioner v. Flowers, 326 U.S. 465, 496 [34 AFTR 301] (1946).

"Home" as used in section 162(a)(2), refers to a taxpayer's principal place of employment. Ronald D. Kroll, 49 T.C. 557, 561 (1968). An exception to this general rule has been recognized. Under the exception, the taxpayer's principal place of employment is not his "home" where his employment there is "temporary" as distinguished from "indefinite" or "indeterminate". See Peurifoy v. Commissioner, 358 U.S. 59 (1958) [2 AFTR 2nd 6055].

The "home" of a construction worker is ordinarily at his principal or regular post of duty, which is usually the city or general area in which he customarily or most frequently works.

If a construction worker has such a city or general area where he usually works and works only temporarily at any other location away from his regular post of duty, the place where he usually works must be recognized as his "home" for traveling expense purposes. Harry F. Schurer v. Commissioner, 3 T.C. 544, acquiescence, C.B. 1944, 24. Following the Commissioner's acquiescence in the Schurer case, it has been the position of the Internal Revenue Service that a construction worker, like any other taxpayer similarly situated, incurs deductible traveling expenses "while away from home" if he is able to show (1) that he has a "home" for such purposes and (2) that his employment at a different location is only temporary and not of substantial duration.

Although neither the Internal Revenue Service nor the courts have attempted to prescribe any specific length of time as representing the usual line of demarcation between temporary and non-temporary periods for traveling expense purposes, an employment or stay of anticipated or actual duration of a year or more at a particular location must be viewed by the Service as strongly tending to indicate presence there beyond a temporary period, and cases involving such an employment or stay will normally for that reason alone, be subjected to close scrutiny. Rev. Rul. 60-189, 1960-1 C.B. 60.

While petitioner's employment possessed a quality of impermanence, it was not "temporary" in the sense that he could reasonably expect his employment to terminate within a fixed or short period of time. Petitioner was not, therefore, "away from home" within the meaning of section 162(a)(2).

Peurifoy v. Commissioner, supra. As was noted in Leo M. Verner, 39 T.C. 749, 754 (1963), "'Temporary' employment may become 'indefinite' since reasonable foreseeability is a function of an ever-changing factual contest." See also Harold C. Pike, 71, 252 P.H. Memo T.C.

CONCLUSIONS OF LAW

A. That petitioner's employment by M.A. Bongiovanni, Inc., at the highway project in St. Lawrence County during the year 1970, was of an indefinite nature.

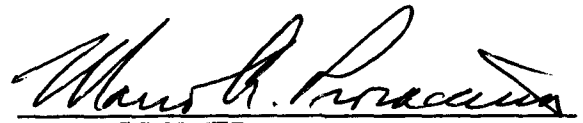
B. That the petitioner did not sustain his burden of proof in showing his residence in St. Lawrence County to be of a temporary and business-related nature.


C. That the traveling and living expenses incurred by petitioner as a construction superintendent in St. Lawrence County during 1970 did not constitute business expenses within the meaning and intent of section 162(a)(2) of the Internal Revenue Code of 1954; Harold C. Pike, 71, 252 supra, P.H. Memo T.C.


D. That the petition of Ervin W. Ross is denied and the Notice of Deficiency issued on November 27, 1972, is sustained.

DATED: Albany, New York
June 25, 1974

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER