

home sweet
TAX



HOME

a closer Look at Federal and State tax issues

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Most taxpayers consider their primary residence as their tax home. When a regularly employed taxpayer maintains his personal residence or abode within the general area of his employment, or as close thereto as is reasonably possible, his “tax home” is his personal residence or abode.¹ But, when the taxpayer retains a residence in one location, some distance from his work location, the issue of “tax home” raises its specter.

This becomes relevant for federal and state tax purposes that go beyond the issue of traveling expense deductions. In this article we’re first going to look at some federal definitions and applications that help clarify what the tax home is and their application to §162; then we’ll progress to some issues specific to state taxes.

Section 162(a)(2) of the Internal Revenue Code allows a taxpayer to deduct expenses for travel fares, meals, and lodging incurred while traveling “away from home” for business purposes.² Though these expenses would appear to be personal in nature, and thus non-deductible, §162(a)(2) allows an exception to alleviate the burden on the taxpayer

for a person to have the requisite intent to change domicile, that person must intend to reside somewhere indefinitely with no present or fixed intent to move on upon the happening of a reasonably certain event.⁹

Of course, the tax courts need not follow bankruptcy court decisions, but it would be nice if there was some continuity. A tax

The costs of the taxpayer’s lodging not incurred in traveling away from home are personal expenses and are not deductible... . Except as permitted under §§162, [or] 212 ... the costs of the taxpayer’s meals not incurred in traveling away from home are personal expenses.”¹³

A tax home is generally defined as the abode in the vicinity of the taxpayer’s principal place of business.

whose job requires him to work away from home and, therefore, basically incur duplicate living expenses. Although it isn’t specifically stated in the statute, the Supreme Court has interpreted §162(a)(2) as requiring the taxpayer to be away from home “overnight” before the provision becomes operative.³

One term often thrown in to the discussion is “domicile.” According to the bankruptcy courts in Kansas, a “domicile ... is determined under federal common law.”⁴ Domicile is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.⁵ A person can reside in one place but be domiciled in another.⁶ A person can only have one domicile that, once established, continues until he renounces it and takes up another.⁷ Changing a person’s domicile requires the concurrence of two elements:

- (1) Physical presence at the new location; and
- (2) An intention to remain there indefinitely, or the absence of any intention to go elsewhere.⁸

The Eighth Circuit Court of Appeals has explained that in order

home, for purposes of determining whether transportation and travel expenses are deductible, generally refers to the area of a taxpayer’s principal place of employment and not where his personal residence is located.¹⁰ Taxpayers with no regular place of business or residence may not be considered away from home.¹¹ This is typically the situation with itinerant workers. As a rule, they don’t have a tax home to be away from.

Further, a taxpayer may not be away from home with respect to travel between his or her residence and principal business location (think commuting) but may be away from home while traveling to and staying near temporary or minor locations. This is all relevant because §262 limits the deductions for personal, living, or family expenses.¹² Regulation §1.262-1(b)(5) disallows the deduction of away-from-home travel expenses to the extent they are not incurred in producing income. In particular, the regulation states:

“The taxpayer’s costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses.

The criteria that distinguish a deductible travel expense under §162(a)(2) from a nondeductible travel expense under §262 are not clearly defined by the statute or the accompanying regulations. Little more guidance is found in the legislative documents that accompanied the passage of the predecessors to these sections.

The Supreme Court in *James*, which dealt with the predecessor of IRC §162(a)(2), noted that Congress’s purpose in allowing this deduction was to mitigate the burden on taxpayers who are compelled to duplicate expenses or to pay higher prices for food and shelter because they are traveling.¹⁴ The Court held, therefore, that “a taxpayer has a ‘home’ [for the purposes of this section] only when it appears that he has incurred substantial continuing living expenses at a permanent place of residence.”¹⁵ In *James* the Court said that a taxpayer who maintains a home while traveling duplicates expenses.¹⁶ The Court also held there is no duplication unless the taxpayer maintains a residence at which he incurs living expenses in addition to those that he incurs while traveling. A deduction for total expenditures for meals and lodging should be held to apply (so far as duplication is the justification) only when the taxpayer has a “home,” the maintenance of which involves substantial continuing



expenses which will be duplicated by the expenditures that the taxpayer incurs when required to travel elsewhere for business purposes.¹⁷

In an ongoing attempt to clarify the “home” issue, the Ninth Circuit stated in *Coombs* that where one’s home is for tax purposes is essentially a question of fact.¹⁸ The Fifth Circuit in *Curtis* developed a rule that, for the purposes of §162(a)(2), a regularly employed “taxpayer’s ‘home’ is his abode at his principal place of business or employment.”¹⁹ The question then becomes, of all the taxpayer’s ‘abodes,’ which is at his principal place of business or employment? If the taxpayer has only one abode, there is no question of fact as to this issue. The Ninth Circuit, however, has never held that the actual location of a taxpayer’s business or employment is his “tax home.” In addition, when a taxpayer accepts employment either permanently or for an indefinite time away from the place of his usual abode, the taxpayer’s tax home will shift to the new location, the vicinity of the taxpayer’s new principal place of business.²⁰

In conclusion, for federal tax purposes, a tax home is generally defined as the abode in the vicinity of the taxpayer’s principal place of business. When determining what expenses can be deducted, it’s important to remember that personal expenses generally are not deductible. A taxpayer’s “home” for purposes of §162(a)(2) of the Code is generally considered to be located at:

- (1) The taxpayer’s regular or principal (if more than one regular) place of business; or
- (2) If the taxpayer has no regular or principal place of business, then at the taxpayer’s regular place of abode in a real and substantial sense.

If a taxpayer comes within neither category (1) nor category (2), the taxpayer is considered to be an itinerant whose “home” is wherever the taxpayer happens to work.²¹ Although the courts distanced themselves from the IRS’s strict position that the tax home is the principal place of business, it isn’t clear that under current standards the IRS would not go along with these rulings if the taxpayer could claim travel “home” as a business expense due to work in the home location. IRS Publication 463, *Travel, Entertainment, Gift, and Car Expenses*, takes into consideration the historical place of residence, whether living expenses have to be duplicated while away from that home, and whether the taxpayer conducts significant business in the area of the residence. However, if a taxpayer has one or more regular work locations away from the taxpayer’s residence, the taxpayer may deduct daily transportation expenses incurred in going between the taxpayer’s residence and a temporary work location in the same trade or business, regardless of the distance.²²

The tax home of the taxpayer can come up in another situation in state tax cases. **Example:** Tom’s permanent residence is in Maine. His (non-working) wife lives there full time, and he goes home to that location every weekend. For five years, Tom has worked in New York, where he owns another residence that he lives in during the week. He has a mortgage on both houses and pays taxes on both properties. Tom has a New York driver’s license, but is registered to vote in Maine. When he was out on medical disability for nine months, he lived in Maine with his wife, and received unemployment benefits from that state.

The State of Maine sent Tom a notice indicating a resident tax return and local income taxes are due, even though he doesn’t work in Maine or the local income tax district in which his Maine residence is located. Tom has income tax withheld for New York but not for Maine. To further confuse the issue, Tom files a resident tax return in New York and a non-resident tax return in Maine. Where is Tom’s tax home?

The first thing to look at is whether the job is temporary or indefinite. A taxpayer who is temporarily employed away from the general area of his permanent residence can be considered away from home and allowed a deduction with respect to travel expenses, including meals and lodging while away from the residence.²³ The deduction is limited to the amount it would have cost for meals and lodging if the taxpayer had stayed at the temporary work location during time off. A taxpayer who continues to pay for lodging at the temporary site during time off may deduct the cost of that lodging and the expenses of returning home up to the amount it would have cost for meals if the taxpayer had stayed at the temporary work location instead of returning home.²⁴

A taxpayer’s employment away from home at a single location is indefinite rather than temporary if the employment lasts for more than one year.²⁵ Individual jobs or assignments at a single location that are expected to last for a year or less may be temporary, even if the taxpayer performs a series of jobs or assignments for the same employer at the same location over a period exceeding one year.²⁶ Individuals participating in a federal criminal investigation or prosecu-

tion, however, are not subject to the one-year limitation. When the assignment is ‘indefinite’ or ‘indefinite,’ 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.²⁷

It would appear, therefore, that Tom’s tax home is in New York. According to the Bankruptcy Courts, however, his domicile would be in Maine because he has never renounced it as his home state and, in fact, intends to live there when he stops working. Even though he lived in Maine for nine months when he was out on disability, his intent and the reality was that he would return to the job in New York.

So how does Tom respond to Maine? It looks as if he has properly filed a non-resident tax return in Maine, but then how does he explain that his spouse is living in Maine and he votes in New York? He should not have to file two resident returns and his wife does live full-time in Maine. Possibly the best alternative is to file Married Filing Joint for federal purposes and, if allowed, Married Filing Separately, for state purposes. Perhaps you can think of a more creative answer to this mind bender, since there’s no one single solution. ▼

The conclusions presented in this article were reached based on the facts and circumstances provided. They are subject to change in the event of tax law changes, additional facts supplied, recently developed court decisions, or further guidance

from the IRS. Any changes or additions to the facts could materially and adversely affect our analysis and conclusions and could lead to a different result.

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End Notes

- 1 IRC §162(a)(2) (1954); *Coombs v. C. I. R.*, 608 F.2d 1269 (9th Cir. 1979).
- 2 IRC §162(a)(2) (1986).
- 3 *United States v. Correll*, 389 U. S. 299, 302-07 (1967).
- 4 *In re Fabert*, 2008 WL 104104 at 2 (Bankr.D. Kan 2008).
- 5 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 3, 48, 109 S.Ct.1957, 104 L.Ed.2d 29 (1989); *In re Ring*, 144 B.R. 446, 449 (Bankr. E.D. Mo. 1992) (citing *Holmes v. Sopuch*, 639 F.2d 431, 434 (8th Cir. 1981)); *In re Fabert*, 2008 WL 104104 at *2 n. 13.

- 6 *Id.*; *In re Fabert*, 2008 WL 104104 at *2 n. 13.
- 7 *In re Ring*, 144 B.R. at 449.
- 8 *Id.* at 450.
- 9 *Id.* at 450.
- 10 26 U.S.C.A. §162(a)(2). *Roberson v. C.I.R.*, 190 F.3d 392 (5th Cir. 1999).
- 11 CCH Tax Research Consultant, BUSEXP: 24,100, Tax Home [online – last viewed 11/20/2011], [http://intelliconnect.cch.com/scion/secure/index.jsp?ScionUser=true&refURL=http%3A%2F%2Ftax.cchgroup.com%2Fprimesrc%2Fbin%2Fhighwire.dll#page\[6\]](http://intelliconnect.cch.com/scion/secure/index.jsp?ScionUser=true&refURL=http%3A%2F%2Ftax.cchgroup.com%2Fprimesrc%2Fbin%2Fhighwire.dll#page[6]).
- 12 IRC §262 (1986).
- 13 Treas. Reg. §1.262-1(b)(5) (2007).
- 14 *James v. United States*, 308 F.2d 204 (9th Cir. 1962).
- 15 *Id.* at 208.
- 16 *Id.* at 207.
- 17 *Id.* at 207. In *James* the taxpayer lived with his parents and incurred negligible expenses maintaining his principal home.
- 18 *Coombs v. C.I.R.*, 608 F.2d 1269, 1274 citing *Frank v. United States*, 577 F.2d 93, 907 (9th Cir. 1978).
- 19 *Curtis v. C.I.R.*, 449 F.2d 225, 227 (5th Cir. 1971).
- 20 *Coombs v. C.I.R.*, 608 F.2d 1269, 1275-76 (9th Cir. 1979).
- 21 Rev. Rul. 93-86, I.R.B. 1993-40,4, (Nov. 29, 1993) citing Rev. Rul. 73-529, 1973-2 C.B. 37, and Rev. Rul. 60-189, 1960-1 C.B. 60.
- 22 CCA 200027047, May 10, 2000.
- 23 *W.H. Horton v. Commr.*, 86 TC 589, (1986); *T.E. Stephenson v. Commr.*, 20 TCM 118, TC Memo. 1961 27; *J.W. Noneman v. Commr.*, 40 TCM 99, TC Memo. 1980-109; *J. Van Hassent v. Commr.*, 60 TCM 1244, TC Memo. 1990-585; *J.E. Peurifoy v. Commr.*, SCt, 358 US 59, 79 Sct 104.
- 24 *Travel, Entertainment, Gift and Car Expenses*, IRS Publication 463 (2007).
- 25 IRC §162(a).
- 26 *T.J. Mitchell v. Commr.*, 78 TCM 355, TC Memo. 1999-283.
- 27 *Rosenspan v. United States*, 438 F.2d 905, 912 (2d Cir. 1971).

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