

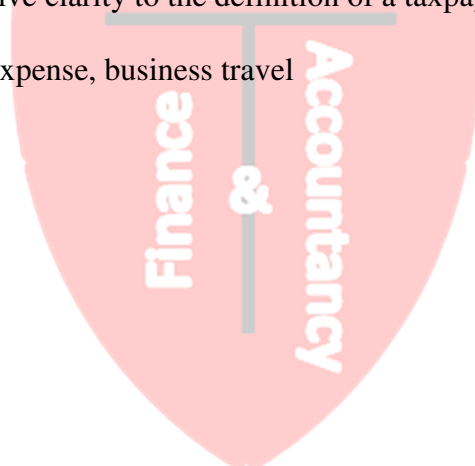
Home sweet home: Considerations for determining a person’s “tax home”

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ABSTRACT

The Internal Revenue Code allows taxpayers to deduct travel expenses when they are traveling away from home due to a business purpose. While the tax provision seems to be straight forward, taxpayers are sometimes disappointed to find out the home referred to in the statute is not necessarily the home in which they reside. When a taxpayer chooses to have a personal residence that is far from his regular work location, the geographic area where the taxpayer earns income and spends most of his efforts is deemed to be the “tax home.” Where there is no regular work location, the personal residence may be considered the tax home depending on the facts and circumstances surrounding the situation. There are a number of court cases where the government and the taxpayer disagree on where the tax home is located, thus, affecting the deductibility of significant expenses. This paper strives to demonstrate the complexity of the issue and give clarity to the definition of a taxpayer’s “tax home.”

Keywords: tax home, travel expense, business travel



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INTRODUCTION

One area of the tax law that can be confusing to taxpayers is the determination of a person's tax home. Merriam-Webster defines a home as "the place (such as a house or apartment) where a person lives." The Internal Revenue Code (IRC), however, does not necessarily define the term "home" in the same way as Webster. As a matter of fact, the definition of "home" varies depending on the tax provision in question. In IRC Section 162, the provision deals with the deductibility of travel expenses. IRC Sec. 162(a)(2) provides that travel expenses incurred due to a trade or business are deductible when a taxpayer is "away from home." For purposes of Section 162, the taxpayer's home is defined as "that place where he performs his most important functions or spends most of his working time." Consequently, in this particular provision, the definition of "home" is not necessarily where the taxpayer resides. In a situation where the individual lives in a location that is distant from his work location, the work location is deemed the "tax home."

The tax provision related to the deductibility of travel expenses is structured such that only the living expenses incurred due to a temporary job or distant job assignment are deductible. When a taxpayer accepts permanent or indefinite employment, the tax home, for the purposes of the "away from home" test, moves to the location of the new employment. The Tax Court stated that "the critical step in defining 'home' in these situations is to recognize that the 'while away from home' requirement has to be construed in light of the further requirement that the expense be the result of business exigencies. The traveling expense deduction obviously is not intended to exclude from taxation every expense incurred by a taxpayer who, in the course of business maintains two homes. Section 162(a)(2) seeks rather 'to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicative living expenses'" (Hantzis v Commissioner, 1981).

Situations that can complicate the determination of one's tax home include family members within the same household who have jobs in different cities, taxpayers who have multiple business locations in different cities, subtle differences in determining if a job is temporary or indefinite, and whether a taxpayer can justify a business reason for maintaining a personal residence in a city that is distant from a job site. The following paragraphs highlight some of these issues and provide insight into the government's definition of a tax home.

FAMILY MEMBERS WITH DIFFERENT TAX HOMES

The tax laws do not assume that members of the same household will have the same tax home. In more and more marriages, one spouse may incur a large commute when the couple's respective jobs are not located in the same geographical area. When determining the location of one's tax home, the same principle holds for all members of the household: the location where each family member works becomes his or her tax home. This particular statute has been tested a number of times within the court system. Even the famous actress and Broadway star, Ethel Merman, went to trial against the IRS in an attempt to prove that her residence in Englewood, Colorado, where she lived with her husband and her children, was her tax home rather than New York City (SIX v U.S., 1971). In her case, she did not report as income payments made by her employer for her lodging in a furnished apartment in New York while starring in the Broadway play, "Gypsy." Given that she was not employed in Colorado, but rather spent most of her working days in New York, the District court agreed with the IRS and stated that while she chose

to maintain a residence in Colorado, the reasons for doing so were purely personal. The fact that her husband had a job in Englewood and her children had attended school there did not constitute a business reason for Ms. Merman to reside there. There are numerous cases (*Coerver v Commissioner*, 1961; *Hammond v Commissioner*, 1954; *Albert v Commissioner*, 1950) with similar arguments, but the same outcome.

Many court cases concerning members of the same household with different tax homes cite *Ronald D. Kroll* (1968) as precedent even though the case does not involve a husband and wife. *Kroll* was a child actor. This case highlights not only a situation where different family members have different tax homes, but also emphasizes a key factor in defining a temporary job. In a situation where an individual is not currently employed and accepts a job with a defined, relatively short duration, the job is not considered a temporary job for this provision. Rather, the individual needs to have a current or recent principal place of employment, then, accept another job or job assignment with an expected duration of less than a year. In *Kroll*, the child actor, Ronald, accompanied by his mother, lived away from the family's personal residence during his stint in two plays located in New York City. The taxpayers deducted travel expenses due to the fact that Ronald was a minor and resided with his parents in Meriden, Connecticut. The *Kroll* family argued that Ronald's job was temporary because there was no way to determine how long the plays would run and the intent was to return home to Connecticut when the stint was over. The Tax Court, however, stated that *Kroll's* job was not considered temporary because he did not have an existing principal place of employment in Meriden, Connecticut from which to establish a tax home. Consequently, Ronald's tax home was considered to be the new, indefinite job location in New York City. The travel expenses were not deductible because the tax home had moved.

In a similar case, a married Boston law student took a summer job in New York (*Hantzis v Commissioner*, 1981). Since her husband was employed in the Boston area and the job was only for the summer months, the student maintained her home in Boston. The First Circuit ruled that her tax home would be New York despite the fact that her personal residence was in Boston. In the ruling, the court stated that she had no business reason or ties to Boston. The fact that she did not have a previously existing job in Boston dictated that her choice to stay in Boston was personal rather than business-related. The very nature of her internship was temporary as the job was only to last about ten weeks. However, since she did not have a prior job in Boston that she would likely be returning to, the court stated that the rule related to temporary employment was not applicable.

TAXPAYERS WITH MULTIPLE JOB LOCATIONS

In situations where taxpayers have two or more business locations, the government looks to see where the "tax home" is located by applying an objective test. The test considers how much time is spent at each location, what types of activities are conducted at each location, and the income earned from each location relative to the taxpayer's total income. These factors are referred to as the "Markey test."

The Sixth Circuit examined the case of a taxpayer who had businesses both near his residence and in a distant city (*Markey v Commissioner*, 1974). The taxpayer spent approximately five days per week at the business in the city away from his residence and two days a week at the business located near his residence. The Tax Court ruled that the taxpayer could use his residence as his tax home based on a subjective test contingent on which of the

business interests was more important to the taxpayer. The appellate court struck down the ruling and emphasized the need to use an objective test based on “where the taxpayer spends more of his time, engages in greater business activity, and derives a greater proportion of his income.” Given that the proportion of income received and the amount of time devoted to the distant business were considerably more than the business near Markey’s residence, the tax home was determined to be the city that was located far from his personal residence. Consequently, the taxpayer could not deduct his lodging and meals while away from his personal residence.

The Markey rules applied in a case involving a Mississippi Supreme Court Justice (Robertson v Commissioner, 1999). The taxpayer was an adjunct law professor in addition to his duties as a judge. Justice Robertson maintained an office and performed his judgeship duties in Jackson, MS while his family resided in Oxford, MS. Justice Robertson lived in an apartment in Jackson from Sunday evening through Thursday afternoon and lived in Oxford with his family the remaining days of the week. He taught a class at the nearby law school on Friday afternoons. A portion of his travel expenses related to the apartment in Jackson were reimbursed by the state of Mississippi. Justice Robertson deducted the unreimbursed travel expenses incurred in Jackson. The IRS disallowed the deduction stating that on an average week, he spent more time in Jackson, and he earned significantly more from his position as judge than he did from his teaching position in Oxford. Consequently, his tax home was Oxford. In his trial, Robertson argued that while he rented an apartment in Jackson, he owned his home in Oxford, and his children attended school in Oxford. Robertson argued that while he was not legally compelled to stay in Oxford, it was in his best political and economic interest to stay there. These arguments did not convince the Tax Court nor the U.S. Court of Appeals, Fifth Circuit.

A similar case ended with a different outcome, however, due to requirements set forth in the state’s Constitution (United States v LeBlanc, 1959). The Louisiana Constitution requires that their Supreme Court justices continue to remain residents of the district they are representing. The Louisiana Supreme Court is in session in New Orleans between October and June. Because of the stipulations in the Louisiana Constitution, Justice LeBlanc was able to deduct his travel expenses related to his stay in New Orleans as ordinary and necessary business expenses. In the Robertson case (1999), the Mississippi Code did not legally compel Justice Robertson to reside in his home district. It went so far as to say that State officers who move due to “official” reasons “shall be deemed in law in all respects to be householders and residents of the county from which they so remove” thus allowing him to be reappointed from his original home district without actually living there. The outcome in the LeBlanc case reminds practitioners that state and local requirements play an important role in acceptable tax positions and should not be overlooked when conducting research on tax matters.

In situations where there are multiple business locations and the tax home is located away from a taxpayer’s primary residence, individuals often try to deduct the travel expenses involved in returning to their personal residence to oversee their secondary business location. If these deductions are scrutinized they may be disallowed. When the trip back to the personal residence is considered to be more personal in nature than business related the expenses are not deductible. Treasury Reg. Sec. 1.162-2(b)(1) states that if “a trip is primarily personal in nature, expense are not deductible even if the taxpayer engaged in some business activities at the destination.” In fact, in Markey (1974), the taxpayer was only allowed to deduct a portion of the transportation expenses from the distant city to his personal residence in order to manage the business near his home. The Sixth Circuit limited the deductible trips to twelve times per year. This number of trips was judged to be reasonable and necessary for the management of his business. In Allen v

Commissioner (2009), the taxpayer's principal business was in a location distant from his personal residence. Mr. Allen maintained an apartment near his principal place of employment and considered it to be the tax home. He also taught at a community college two evenings a week that was in the same town as his primary residence. So, he did have a business reason for being there. However, the court believed that Mr. Allen could have just as easily returned to his apartment located near his primary job rather than driving to his personal residence located near his part-time job. Thus, his meals and transportation involved in his trips home were not deductible.

TAXPAYERS WITH LEGISLATED TAX HOMES

In certain employment situations, a taxpayer's tax home is legislated. For instance, in the case of professional sports athletes the tax home is generally held to be the home office of the team who employs the athlete assuming the employment is considered permanent. This position has held in a number of cases (*Gardin v Commissioner*, 1975 and *Wills v Commissioner*, 1969) and appears to be based on Rev. Rul. 54-147, 1954-1 CB51. The Ruling specifies professional baseball players and purports that the "club team" headquarters is the tax home for the players. This rule has been applied to a number of professional sports. In one particular case, however, a professional hockey player was able to convince the Court that his employment with two different hockey teams in two consecutive seasons was temporary. In *Horton*, (1978), the taxpayer was a professional hockey player in the minor leagues. He had a well-established tax home in Flint, Michigan, where he worked as a real estate agent in addition to participating on various hockey teams. Between hockey seasons, the taxpayer would return to Flint to resume his real estate business. In *Horton's* case, during the two tax years in question, the taxpayer accepted two different contracts in cities distant from his home that were only for individual seasons lasting about six months per season. He returned to Flint at the end of each season. There was no reason to believe the employment would continue beyond that time frame with either team. Typically, a job's lack of permanence does not categorize it as being temporary (*Neal v Commissioner*, 1982). Rather, it is classified as indefinite. However, if termination of the job is foreseeable within a short period of time the job may be considered to be temporary (*Peurifoy v Commissioner*, 1958). In *Horton's* case, the Tax Court determined that the employment was "temporary" despite the IRS's argument that it was "indefinite." In making their ruling, the Court stated that it did consider that the taxpayer's wife had stable employment in Flint and contributed more than fifty percent of the household's income making it unreasonable to move the permanent residence to California with the temporary nature of *Horton's* hockey contracts. This consideration is interesting given that married couples often have different tax homes. The fact that *Horton* had played for a hockey team in Flint when the couple first moved to that particular location combined with the taxpayer's existing real estate activities likely contributed to the conclusion that there was existing employment and that the tax home was well-established in Flint.

Another area where the tax home is legislated is for members of Congress. The personal residence maintained in the State or territory the Congressperson represents is considered to be the tax home. However, there is a limit of \$3,000 per year that can be deducted for business travel expenses in conjunction with travel to Washington D.C.(IRC Sec. 162(a)).

TAXPAYERS WITH NO TAX HOME

There are other situations where a taxpayer is determined to have no tax home. A precondition to an individual being “away from home” is that he has a home from which to be away. Under the guidance of IRC Sec. 162(a)(2), the taxpayer must incur substantial continuing living expenses at a permanent place of residence. This requirement fits within the purpose underlying section 162(a)(2) which is to alleviate the burden of the taxpayer who, because of business reasons, needs to maintain two places of residence resulting in duplicate living expenses (Tucker v Commissioner, 1971). Rev. Rul. 75-529, 1973-2 CB 37 further explains that if an individual does not have a regular or principal place of business due to the nature of his business, then he may use his “regular place of abode in a real and substantial sense.” If a taxpayer meets neither of the above criteria, the individual is deemed to be an itinerant worker who takes his tax home with him as he travels for work. The IRS will look to a three part test to judge the validity of a taxpayer’s claim to a home using the “real and substantial” definition:

(1) Whether the taxpayer performs a portion of his business in the vicinity of his claimed abode and uses such abode (for purposes of his lodging) while performing such business there; (2) Whether the taxpayer’s living expenses incurred at his claimed abode are duplicated because his business requires him to be away therefrom; and (3) Whether the taxpayer (a) has not abandoned the vicinity in which his historical place of lodging and his claimed abode are both located, (b) has a member or members of his family (marital or lineal only) currently residing at his claimed abode, or (c) uses his claimed abode frequently for purposes of his lodging. (Rev. Rul. 75-529, 1973-2 CB 37)

If all three factors are present, the IRS will conclude that the individual does have a tax home. If two of the three factors are present, the IRS will consider the circumstances to determine the ruling. However, if two of the three factors are not present, the Service will conclude that the worker is an itinerant with no tax home.

In James (1962), the Ninth Circuit denied travel deductions for a salesman who had no permanent home or headquarters. The taxpayer was deemed to be “constantly in a travel status and his home was wherever he happened to be.” The taxpayer maintained a post office box, bank accounts, insurance, and car registrations in Reno, N.V. and therefore, listed Reno as his “home.” He deducted travel expenses when away from Reno. However, he had no physical home there but rather lived in a hotel and ate in restaurants when in town.

In another case where a taxpayer was determined to have no tax home, the individual was an independent contractor who worked at various job sites in Wisconsin, Illinois, and Virginia. In Cerny (1991), the individual rented the basement of a friend’s house in Chicago, Illinois. He maintained a health club membership and registered his cars in Chicago. However, the Tax Court did not consider his rented room to be his “tax home” because there were no employment prospects in the surrounding area and the taxpayer had minimal ties to the community. The taxpayer never had any jobs in Chicago and did not have any business contacts in that area. During the tax years in question, the taxpayer worked as an independent contractor in Wisconsin, Illinois, and Virginia. While in each of these cities, the taxpayer rented an apartment. He deducted transportation, meals, and lodging since he considered himself to be “away from” his rented basement home. The Tax Court denied all travel deductions to the various job sites stating

the taxpayer's ties to Chicago were considered to be too minimal to establish the area as his permanent home.

In two similar cases the taxpayers kept personal belongings at a relative's home and had and had mail delivered there. Hicks (1966) kept personal items at his parents' home when he was traveling, and Rosenspan (1971) kept belongings at his brother's home. In both cases, the individuals were away from their relatives' homes the vast majority of the year and were denied deductions for travel expenses. The taxpayers weren't maintaining homes, thus, did not incur duplicate living expenses. The above cases indicate the intent of Congress to make a distinction between a taxpayer who maintains a permanent residence and incurs additional living expenses when away from home due to business from a taxpayer without such a residence.

TAXPAYERS WITH AN OFFICE IN THEIR HOME

Taxpayers who work out of their homes may appear to have an easy time determining their tax home. After all, if the office is in the home, the decision seems straight-forward. In most instances, sales representatives who work from their homes are allowed to deduct the cost of travel from their home to their clients' locations. However, in one case (Daly, 1981), the taxpayer's residence was in McLean, Virginia and his sales territory was in eastern Pennsylvania, Delaware, and New Jersey. Daly's wife was employed in the Washington D.C. area which was near the couple's personal residence. The Fourth Circuit denied travel deductions for the tax year 1975 for weekly sales trips made into the sales territory citing that the personal residence was maintained outside the sales territory for personal reasons. Although Daly did not maintain an office in Philadelphia, the majority of his client-base was located in that particular city and the surrounding area, and he would typically spend two nights a week in the territory. The Tax Court and the Fourth Circuit agreed that Philadelphia was Daly's tax home despite his completing necessary paperwork and sales logs in his home office located in McLean. Thus, the courts disallowed meals and lodging expenses claimed when Daly was in the Philadelphia area and commuting expenses from McLean to the Philadelphia area. Somewhat surprisingly, the location of one's sales territory relative to the personal residence has important and costly tax consequences.

A more recent case involving a self-employed individual with a home office (Roberts, 2011) was ruled in favor of the taxpayer. Roberts often traveled out of state to a testing facility that he leased for his business. Despite his trips to the testing facility, the majority of the working hours were spent at the home office doing administrative work and writing up the many reports required by the business. The home was deemed to be centrally located within the territory where the taxpayer accepted work-related projects. A key difference in the Roberts case from that of Daly is that Roberts' home was considered to be centrally located to the various jobs he accepted whereas Daly did not live in his sales territory.

CONCLUSION

The rules surrounding an individual's tax home are confusing because the determination depends on the facts and circumstances of the situation. Since the circumstances vary from taxpayer to taxpayer, the statute lends itself to some interpretation. This paper provides guidance in making the determination when in a number of uncertain situations. It also outlines some steps that can be taken by taxpayers to support their case for having a tax home in a particular location.

For the individuals where even having a home at all is questionable, becoming more established in the community where they land between jobs would certainly make a stronger case that there was, indeed, a tax home. While the government does not want to bear the financial burden of subsidizing people who choose to live at a distance from their workplace, the idea that a married couple can have two different tax homes or that a tax home moves to a job location that has a definite, short-term time span is surprising to many taxpayers. With some background knowledge of the intricacies of these tax laws, couple's may be better equipped to make financially sound decisions when regarding the location of their homes and the proximity to their jobs. Again, having a business reason to locate in the same city with a spouse lends to the argument that the couple's tax home is in the same location. Rev. Rul. 75-432, 1975-2 CB 60 states that a tax home is a "question of fact that must be determined on the basis of the particular circumstances of each case." As in most tax matters, having knowledge on the front end of a potentially sticky issue will help a taxpayer successfully navigate through the situation rather than trying to come up with a defensible position after the fact.

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Journal of Finance and Accountancy, Volume 18 – January, 2015

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