Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:6:OKL:TL-N-2668-01
ALDarnold

date: JUN 08 2001

to: Manager, PSP Compliance Support, Area 10
Attn: Ken Burrell

from: Associate Area Counsel (SB/SE)

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subject: **Request for Advisory Opinion**
Taxability of Business Travel
The One-Year Rule and Break in Service Requirements

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FACTS

By memorandum dated April 23, 2001, you requested that we review a memorandum from [redacted] to its employees regarding the taxability of travel expenses incurred by employees who work at an engagement site more than 100 miles from home for an extended period of time.

The memorandum instructs the employees that they can avoid the taxation of their travel expense reimbursements by taking what is referred to as a "22-Day Tax Break" prior to their one-year anniversary at the engagement site.

As discussed in greater detail below, we do not believe that the 22-Day Tax Break would qualify to bring a taxpayer's travel expenses within the exclusion of I.R.C. § 162(a)(2). Each particular situation would need to be evaluated on it's specific facts, but we do not agree with the writers of the memorandum that a bright-line use of a 22-day break would be sufficient in all cases.

DISCUSSION

I.R.C. § 162(a)(2) provides that a deduction shall be allowed for all ordinary and necessary expenses paid or incurred in carrying on a trade or business, including traveling expenses while

away from home in the pursuit of a trade or business. This section further clarifies that for purposes of paragraph (a)(2), the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds one year.

The Courts have consistently held that a taxpayer's "home" within the meaning of Section 162(a)(2) is his principal place of employment. Kroll v. Commissioner, 49 T.C. 557, 561 (1968); Blatnick v. Commissioner, 56 T.C. 1344, 1348 (1971). An exception has, however, been recognized when a taxpayer's employment at his principal place of duty is "temporary" as distinguished from "indefinite" or "indeterminate." See, Claunch v. Commissioner, 29 T.C. 1047 (1958), aff'd 264 F.2d 309 (5th Cir. 1959) and Peurifoy v. Commissioner, 358 U.S. 59 (1958).

Rev. Rul. 75-432, 1975-2 C.B. 60, provides further guidance, stating that if a period of work is indefinite, travel expenses are not deductible because the individuals are treated as though they changed the location of their tax homes to their work location. Employment that lacks permanence should be treated as "indefinite" rather than "temporary" unless it is the sort of employment in which termination within a short period could be foreseen. Blatnick, at 1348, citing Albert v. Commissioner, 13 T.C. 129, 131 (1949).

Brief interruptions of work at a particular location do not, standing alone, cause employment which would otherwise be "indefinite" to become "temporary." Claunch, at 1051-1052.

Rev. Rul. 93-86, 1993-2 C.B. 71, provides guidance for determining whether employment is temporary or indefinite. The determination focuses on the taxpayer's expectation at the time the assignment begins. Specifically the factors are: (1) employment at a single location away from home that is expected to and does last one year or less is treated as temporary; (2) employment expected to last more than one year will be treated as indefinite, regardless of whether the work exceeds one year; and (3) employment that is initially expected to last one year or less that is later expected to last longer than one year will be treated as temporary until the date the expectations change.

Many facts should be evaluated in a determination of the taxpayer's intentions, including the length of the engagement contract, the type of work being performed and the continued maintenance of a home at the original work location.

In the [redacted] memorandum, they establish a policy of treating employees who take a "22-Day Tax Break" prior to their one-year anniversary at a remote engagement site, as being temporarily at the site for purposes of reporting their travel expenses.

Because of the highly individual nature of the factual inquiry involved, the Service has not published guidance regarding whether, or to what extent, a break in service at a work location will affect the determination that a taxpayer is or is not employed in a single location for one year or less. In the Blatnick opinion discussed above, the taxpayer had a three week (21 day) break due to inclement weather at his remote job site. The Court found that the taxpayer's employment was indefinite, despite this break and held that his travel expenses were not deductible.

We have found no cases where a taxpayer has successfully argued that his employment was temporary because of a break such as the one proposed in the [redacted] memorandum. The fact that the suggested period is only one day longer than the period in the Blatnick case may or may not be a coincidence, but it is highly unlikely that the additional day would change the result.

Instead of emphasizing the length of a taxpayer's break in his remote employment, we would encourage you to emphasize the factual determinations of the taxpayer's intent and expectations at the time the employment begins. If the assignment is realistically expected to last for one year or more, it should be treated as indefinite.

It is additionally our opinion that since the determination of an employee's tax home is made by location, the result should be the same whether the employee is at the remote location for a single engagement or a series of engagements which are considered as a group.

CONCLUSION

Based on the above discussion, it is our recommendation that the taxpayer who provided the [redacted] memorandum be advised that he should not rely on the "22-Day Tax Break" to bring his travel expenses within the I.R.C. § 162(a)(2) exclusion. He should further be informed that each case must be evaluated on its unique facts and circumstances under the guidelines discussed above.

With this memorandum, we are closing our file. However, if you have any further questions or need additional information, please feel free to contact Attorney Ann L. Darnold at (405) 297-4815.

MICHAEL J. O'BRIEN
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cc:
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