

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

WARREN A. BREHMER,)	
)	
Plaintiff,)	No. 010916D
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
STATE OF OREGON,)	
)	
Defendant.)	DECISION

Plaintiff appeals Defendant’s denial of Plaintiff’s deductions claimed as employee business expenses for tax year 1997. A telephone trial was held on Thursday, January 24, 2002. Mr. Warren Brehmer appeared on his own behalf. Ms. Tammy Spangler, Tax Auditor, appeared on behalf of Defendant.

STATEMENT OF FACTS

Mr. Brehmer testified that his home for purposes of taxation is Washington. As a result of a decision to close the Trojan Nuclear Electric Plant in 1993, Mr. Brehmer testified that he was eligible through the U.S. Department of Labor to participate in a retraining program. Subsequently, he enrolled in Portland State University. In June, 1996, Mr. Brehmer graduated from Portland State University after successfully earning his engineering degree. After graduation, Mr. Brehmer returned to his home in Bremerton, Washington and began searching for a job.

Mr. Brehmer testified that he “reestablished” Washington as his tax home “by the move and by establishing employment with Olsten Staffing Service Seattle office.” (Ptf’s Letter dated January 14, 2002.) In December, 1996, Olsten Staffing Services (Olsten) offered Mr. Brehmer a temporary assignment with Convergent System located in Beaverton, Oregon. Even though the Olsten office was located in Washington, the

temporary job assignment offered to Mr. Brehmer was located in Oregon. Mr. Brehmer stated that “[p]ositions for Construction/Project Engineers in the Seattle area were non-existent in 1996 for a person with my qualifications.” (Def’s Ex B-1.)

In December, 1996, Mr. Brehmer entered into a lease agreement to rent a condominium in Beaverton, Oregon. Mr. Brehmer stated that he “researched the Portland area for extended stay lodging at motel/hotels and learned that securing an apartment was more cost effective.” (Ptf’s Letter dated July 6, 2001.) Mr. Brehmer had lived in the same condominium complex while he attended Portland State University. (Def’s Ex A.)

Mr. Brehmer testified that he frequently worked from his Bremerton, Washington home and stayed at his home when reviewing Washington job sites. Mr. Brehmer testified that his son (20 years of age in 1997) and daughter (18 years of age) lived with him in Washington. He would return to his Washington home “sometimes during the week to attend” his “daughter’s college basketball games.” (Ptf’s Letter dated July 6, 2001.)

In April, 1997, Mr. Brehmer’s temporary employment was terminated. Mr. Brehmer began his job search. He continued to rent and maintain the Beaverton condominium because he had entered into a year lease.

In August, 1997, Mr. Brehmer was hired by Shimizu America, Inc. (Shimizu). He stated that Shimizu’s first Seattle project was scheduled for February 1998. Mr. Brehmer was asked to take a temporary assignment for Shimizu in Tigard, Oregon until the Seattle project began. (*Id.*) Until April, 1998, Mr. Brehmer managed “two Portland State [University] remodel projects and Value Engineering on W.S.U. [Washington State University], Vancouver [Washington] and two other projects.” (*Id.* at 2.) During this “temporary assignment”, Mr. Brehmer testified that he “continued to return home to

my Washington residence on most weekends and holidays.” (*Id.*)

Mr. Brehmer listed the Beaverton address as his home address on his 1997 federal income tax return, dated March 15, 1998. (Def’s Ex H-1.) On his 1997 federal income tax return, Mr. Brehmer deducted rent (\$10,210), housecleaning (\$693), phone (\$1,555) and other expenses such as renter’s insurance, cable TV, electric and newspaper, as “duplicate living expenses” incurred for business purposes. (Def’s Ex I-1.) Some of these expenses were incurred to rent, maintain and insure the Beaverton home. Other expenses, i.e., cable TV, electric, phone and newspaper, were incurred while Mr. Brehmer lived in the Beaverton home. Mr. Brehmer continued to have an Oregon driver license until it expired in 1999. His vehicle registration was renewed in 1997 and maintained until it expired in 1999.

Mr. Brehmer testified that he was employed by two “Seattle based firms, establishing Washington as my principle place of business.” (Ptf’s Letter dated July 6, 2001 at 2.) Mr. Brehmer relied on *Linetsky v. Commissioner (Linetsky)*, 68 TCM 8, TC Memo, 1994-306, to support his conclusion that he can claim the duplicate living expenses as employee business expenses. In *Linetsky*, an electrical engineer was allowed to deduct his expenses for meals, lodging, travel and other related business expenses while he was working away from home on a temporary assignment in another state.

Ms. Spangler disagreed that Mr. Brehmer’s situation was the same as that described in *Linetsky*. Defendant’s Conference Officer, Ms. Theresa Schuh, concluded that because Mr. Brehmer “had been maintaining a permanent place of residence in Oregon, had previously been employed in Oregon, had not been previously employed in Washington, and went to work for an Oregon employer,” *Linetsky* was not applicable and Mr. Brehmer was not entitled to deduct the duplicate living expenses. (Def’s

Conference Letter dated April 11, 2001.) Ms. Spangler cited the following Oregon Tax Court cases in support of her conclusion that Mr. Brehmer's tax home was Oregon: *Hintz v. Dept. of Rev.*, 13 OTR 462 (1996); *Seeto v. Dept. of Rev.*, OTC-MD No. 000038D (March 23, 2001) (Small Claims); *Harding v. Dept. of Rev.*, 13 OTR 454 (1996); *Davis v. Dept. of Rev.*, 13 OTR 260 (1995). (Def's Letter dated December 28, 2001.) In addition, Ms. Spangler concluded that Mr. Brehmer "kept his Washington home by personal choice, not based on the job prospects in his trade." (*Id.*) Mr. Brehmer testified that he has owned his Washington home, a double-wide mobile home located in Bremerton, Washington, since 1976 or 1978. He lived in the home until 1986 when he moved to Portland.

COURT'S ANALYSIS

The issue before the court is whether Plaintiff's "tax home" was Bremerton, Washington, for the 1997 tax year, allowing travel, meals and lodging expenses to be deducted under IRC section 162(a)(2) (1996). The Oregon Tax Court has previously held that the Oregon standard is the following definition of tax home announced by the Internal Revenue Service Commissioner:

"Generally, a taxpayer's "home" for purposes of section 162(a)(2) of the Code is 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. Rev Rul 83-82, 1983-1 CB 45"; *Hintz v. Dept. of Rev.*, 13 OTR 462, 467 (1996).

Mr. Brehmer alleges that he has more than one regular or principal place of business. Mr. Brehmer testified that while he was employed at Convergent Systems he worked at his home in Washington. While working for Shimizu, Mr. Brehmer testified that he worked on various projects located in both Oregon and Washington.

The general rule is that “a taxpayer’s principal place of business is his ‘tax home.’” *Barone v. Commissioner*, 85 TC 462, 465 (1985). The court considers various factors to determine the principal place of business including the time spent on business activity in each area, the amount of business activity in each area, and the amount of the resulting financial return in each area.¹ Even though Mr. Brehmer was seeking permanent employment in Washington, he had no employment ties to Washington. Mr. Brehmer’s most recent employment before entering Portland State University was Oregon. For tax year 1997, Mr. Brehmer was employed through a temporary agency by two Oregon corporations. Each corporation had a principal place of business in Oregon. Mr. Brehmer failed to submit any documentation to support the allocation of his time between the Oregon offices of his two employers and his Washington home or other work locations in Washington. There was no evidence to indicate that Mr. Brehmer’s “financial return” came from any other source than Oregon. Without evidence to the contrary, the court concludes that Mr. Brehmer’s principal place of business was Oregon.

Mr. Brehmer testified that while working for Convergent Systems, his employer permitted him to work at his Bremerton home. The courts have long held that where a taxpayer’s primary motivation in returning from his “tax home” to his residence is personal (i.e., to be with his family) the taxpayer is not away from home even though he performs some business at his residence. *See Matteson v. C.I.R.*, 514 F2d 43 (8th Cir 1975), *aff’g* TC Memo 1974-96; *Rider v. Comr.*, TC Memo 1988-288. In his testimony,

¹Rev Rul 63-82, 1963-1 CB 33; Rev Rul 61-67, 1961-1 CB 25; both as modified by Rev Rul 76-453, 1976-2 CB 86, suspended by IR 1884 (Sept. 7, 1977) (Internal Revenue Service announced that it had suspended the effective date of the Rev Rul 76-453 which disallowed the deduction of transportation expenses and classified such expenses as nondeductible commuting expenses).

Mr. Brehmer stated he returned to Washington for his daughter's college basketball games and to look for a job in the Seattle area. Mr. Brehmer has not persuaded the court that his decision to travel to Washington was for any reason other than personal.

In the alternative, Mr. Brehmer claims that his tax home is his regular place of abode, which is Bremerton, Washington. "Residence * * * [is] a factual place of abode." *de la Rosa v. Dept. of Rev.*, 313 Or 284, 289, 832 P2d 1228 (1992). A person can have more than one residence. In evaluating the deductibility of Plaintiff's claimed expenses, the court is guided by the rule that "[a] taxpayer cannot deduct the cost of meals and lodging while performing duties at a principal place of business, even though the taxpayer maintains a permanent residence elsewhere. Congress did not intend to allow as a business expense those outlays that are not caused by the exigencies of the business but by the action of the taxpayer in having a home, for the taxpayer's convenience, at a distance from the business." Rev Rul 75-432, 1975-2 CB 60, 61.

In this case, Mr. Brehmer alleges that his permanent residence is Washington. Mr. Brehmer has owned a double-wide mobile home in Washington since the late 1970s. Since 1986, except for short periods of time in 1996 and 1997, he has lived in Oregon. At the time Mr. Brehmer was offered employment in Beaverton, Oregon, he entered into a year lease at the same condominium complex where he had lived while going to Portland State University. In addition, Mr. Brehmer continued to have an Oregon driver license until it expired in 1999. His vehicle registration was renewed in 1997 and maintained until it expired in 1999. He was registered to vote in Oregon. Mr. Brehmer did not abandon his Oregon domicile when he temporarily lived in Washington in 1996 and 1997. His decision to enter into a year lease, renew his Oregon vehicle registration in 1997, and continue his Oregon driver license and Oregon

voter registration are evidence that Oregon was his domicile for tax year 1997.

Mr. Brehmer's claimed expenses are typically incurred by someone planning to live in reasonable proximity of his business. These claimed expenses were Mr. Brehmer's personal living expenses. He rented a condominium close to the Beaverton office of his employer. He subscribed to the local newspaper, ordered cable television, and employed a house cleaning service. There was no business necessity for incurring these expenses when as the court concluded Oregon was his residence. See *Harding v. Dept. of Rev.*, 13 OTR 454, 458-459 (1996). The court concludes that these expenditures were personal and not deductible away from home travel expenses.

CONCLUSION

IT IS THE DECISION OF THE COURT that Plaintiff's appeal is denied.

Dated this _____ day of March, 2002.

JILL A. TANNER
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE JILL A. TANNER ON MARCH 21, 2002. THE COURT FILED THIS DOCUMENT ON MARCH 21, 2002.