

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

DON A. AUSTIN and PATRICIA A. AUSTIN,)	
)	
Plaintiffs,)	TC-MD 060634C
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiffs appeal Notices of Deficiency Assessment for the 2002 and 2003 personal income tax years. Trial was held May 23, 2007. Plaintiffs were represented by Mark Dunst, Licensed Tax Consultant. Plaintiff Don A. Austin (Austin) was present for the trial. Defendant was represented by Allen Schweigert.

The following exhibits were received by the court without objection: Plaintiffs' Exhibits 1 through 9, and Defendant's Exhibits A and B. Plaintiffs also filed a "Trial Memorandum" (Ptf's' Trial Memo).

I. STATEMENT OF FACTS

This case is before the court on the following stipulated facts:¹

1. Mr. Austin is a construction worker.
2. Mr. Austin has lived in Turner Oregon at 6945 Glendora Way for the last nine years.
3. During 2002 Mr. Austin worked for Finisher's Corporation located at 7130 SW Fir Loop, Suite 100 Tigard Oregon and Cascade Acoustics, Inc located at 19335 SW Teton Avenue Tualatin Oregon.

¹ The form and style of the Stipulated Facts produced here are per the original filed by the parties on December 20, 2006.

4. During 2003 Mr. Austin worked for Performance Contracting Inc located at 8015 SW Hunziker Rd Tigard Oregon, Cascade Acoustics, Inc located at 19335 SW Teton Avenue Tualatin Oregon and Fred Shearer & Sons, Inc located at 5500 SW Arctic Drive Beaverton Oregon.
5. The mileage log provided to the Department of Revenue for tax year 2002 and 2003 by Mr. Austin is valid. (See Exhibit B-1/B-8)
6. All of Mr. Austin's jobs were temporary during 2002 and 2003, i.e. less than one year
7. Mr. Austin's jobs, in Portland, Eugene, Gresham, and The Dalles are outside the metropolitan area that he lives.
8. Mr. Austin worked in Salem for approximately 3 months in 2003 (September 8, 2003 through December 5, 2003) and not at all in 2002.

The following additional facts are relevant to this appeal:

During 2002, Austin worked at the following Oregon locations: The Dalles, Hillsboro, and Eugene. (See Def's Ex B at 1-3.) During 2003, Austin worked at the following Oregon locations: Eugene, Portland, Lake Oswego, Gresham, Tualatin, and Salem. (*Id.* at 4-8; Ptf's Trial Memo at 2.) The court takes judicial notice² of the following approximated driving distances (in miles) between locations relevant to this appeal:

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² Under the Oregon Evidence Code, judicial notice may be taken, "whether requested or not[.]" of facts "not subject to reasonable dispute in that it is either: (1) Generally known within the territorial jurisdiction of the trial court; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(b), 201(c)(d).

Starting Location	Ending Location	Approximate Mileage (one way)³
Turner, Oregon	Salem, Oregon	9 miles
Salem, Oregon	Portland, Oregon	46 miles
Salem, Oregon	Tualatin, Oregon	37 miles
Salem, Oregon	Tigard, Oregon	40 miles
Salem, Oregon	Lake Oswego, Oregon	41 miles
Salem, Oregon	Beaverton, Oregon	44 miles
Salem, Oregon	Hillsboro, Oregon	54 miles
Portland, Oregon	Lake Oswego, Oregon	7 miles
Portland, Oregon	Tualatin, Oregon	11 miles
Portland, Oregon	Hillsboro, Oregon	18 miles

The court also takes judicial notice of the following relative locations: Turner is located southeast of Salem (9 miles); Salem is located south of Portland (46 miles); Lake Oswego and Tualatin are both located between Salem and Portland, but considerably closer to Portland than they are to Salem.⁴ Finally, the court takes judicial notice of the following facts: Portland is Oregon’s largest city with a population in 2000 of 529,121; Salem had a 2000 population of 136,924.⁵

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³ Source: Rand McNally mileage calculator at www.randmcnally.com.

⁴ Source: Google Maps at www.google.com/maps.

⁵ Source: Bill Bradbury, Secretary of State, *Oregon Blue Book*, City Populations: 1970-2005, 252 (Julie Yamaka, ed) (2007-2008). The court notes that the Oregon Blue Book lists the 2005 populations of Portland and Salem as 556,370 and 147,250, respectively.

Plaintiffs seek to deduct mileage from Austin's home in Turner to the following work locations: for 2002, mileage to and from The Dalles, Hillsboro, and Eugene; for 2003, mileage to and from Eugene, Portland, and Gresham.⁶ (*See* Ptf's' Compl at 9; *see* Ptf's' Trial Memo at 2.)

II. ANALYSIS

The Oregon legislature has expressed the intent to make Oregon's personal income tax law identical in effect to the federal Internal Revenue Code (IRC) for the purpose of determining taxable income of individuals. *See* ORS 316.007.⁷ The court, therefore, looks to federal law to determine whether the claimed expenses are deductible for income tax purposes.

IRC section 162(a) provides in relevant part that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."⁸ In contrast, IRC section 262(a) disallows deductions for "personal, living, or family expenses[.]" The cost of daily commuting to and from work is considered a nondeductible personal expense and is generally not deductible under IRC section 162(a)(2). *See* Treas Reg 1.162-2(e) (1960) ("Commuters' fares are not considered as business expenses and are not deductible.").

In certain circumstances, a taxpayer may deduct transportation expenses incurred in traveling from their residence to certain temporary work locations. On point is Revenue Ruling 99-7, which holds in pertinent part as follows:

"(1) A taxpayer may deduct daily transportation expenses incurred in going between the taxpayer's residence and a *temporary* work location *outside* the metropolitan

⁶ Plaintiffs originally also deducted mileage to Lake Oswego and Tualatin but state in their Trial Memorandum that "[m]ileage to Lake Oswego * * * and mileage to Tualatin should [] not have been claimed." (Ptf's' Trial Memo at 2.)

⁷ All references to the Oregon Revised Statutes (ORS) are to 2001.

⁸ All references to the Internal Revenue Code (IRC) are to 2000.

area where the taxpayer lives and normally works. However, unless paragraph (2) or (3) below applies,⁹ daily transportation expenses incurred in going between the taxpayer's residence and a *temporary* work location *within* that metropolitan area are nondeductible commuting expenses.”

Rev Rul 99-7, 1999-1 CB 361, WL 15135 (Jan 15, 1999) (Rev Rul 99-7) (emphasis in original).

This holding of Revenue Ruling 99-7 sets forth a two-prong test for the deductibility of daily transportation expenses: first, the work location must be temporary; second, the work location must be outside the metropolitan area where taxpayer lives and normally works. *Id.* Often, as in this case, the second prong of the test has two parts: determining the appropriate metropolitan area, and determining where the taxpayer lives and normally works.

A. *Temporary work location*

For the purpose of determining whether a work location is temporary, Revenue Ruling 99-7 provides that “[i]f employment at a work location is realistically expected to last (and does in fact last) for 1 year or less, the employment is *temporary* in the absence of facts and circumstances indicating otherwise.”¹⁰ (Emphasis in original.) Here, the parties have stipulated that all of Austin’s work assignments in 2002 and 2003 were less than one year. (Stip Facts at 6.) The court therefore finds that Austin’s work locations in 2002 and 2003 were temporary as defined in Revenue Ruling 99-7.

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⁹ The parties agreed at the trial that paragraphs (2) and (3) of Revenue Ruling 99-7 are not applicable to the present case.

¹⁰ Revenue Ruling 99-7 modified the definition of temporary work location and replaced the description in Revenue Ruling 94-47, “any location at which the taxpayer performs services on an irregular or short-term (*i.e.*, generally a matter of days or weeks) basis[.]” with the one year standard. *See* Rev Rul 99-7.

B. *Outside the metropolitan area where the taxpayer lives and normally works*

The question of whether Austin worked at temporary locations *outside* the metropolitan area where he lives and normally works is necessarily preceded by the following question: Did Austin live and normally work in the *same* metropolitan area?

1. *Metropolitan area*

a. *Generally*

The term “metropolitan area” is not defined in Revenue Ruling 99-7, nor in prior revenue rulings discussing the deductibility of daily transportation expenses. *See* Rev Rul 99-7 (discussing Revenue Ruling 94-47, 1994-2 CB 18; Revenue Ruling 90-23, 1990-1 CB 28; and Revenue Ruling 190, 1953-2 CB 303).¹¹

Some courts appear to place a general requirement on the deductibility of commuting expenses that the job location be “distant” from the taxpayer’s residence, that the location must require the taxpayer to “commute long distances,” or that it must be “outside the area of the taxpayer’s regular abode[.]” *Diaz v. Comm’r*, TC Memo 2002-192, WL 1796832 (2002) (citing *Dahood v. United States*, 747 F2d 46, 48 (1st Cir 1984); *Ellwein v. United States*, 778 F2d 506, 512 (8th Cir 1985)).

Other courts, including this one, have previously referred to distances in discussing the reach of a given metropolitan area. *See Williams v. Dept. of Rev.*, TC-MD No 050811B, WL 549767 at *2 (Feb 12, 2007) (*Williams*) (concluding that plaintiff did not live and work

¹¹ Revenue Ruling 99-7 states that its effect on these other documents is as follows: Revenue Ruling 190 is “obsoleted[.]” and Revenue Rulings 90-23 and 94-47 “are modified (regarding the definition of *temporary* work location) and superceded.” Rev Rul 99-7 (emphasis in original). Although in the case of *Wheir v. Commissioner* the United States Tax Court stated that neither Revenue Ruling 99-7 nor any of the intervening revenue rulings on the subject “appears to have changed the concept of ‘metropolitan area’ in [Revenue Ruling] 190[.]” this court is nonetheless mindful of the restriction placed on the *Wheir* opinion that, pursuant to IRC section 7463(b), it may not be treated as precedent for any other case. TC Summ Op 2004-117, WL 1921830 (2004) (*Wheir*).

in the same metropolitan area because work assignments were at least 40 miles away from plaintiff's home); see *Porter v. Dept. of Rev.*, TC-MD No 060550B, WL 1437493 at *2 (Apr 23, 2007) (*Porter*) (concluding that plaintiff had no jobs in the metropolitan area of Salem because the nearest assignment was at least 50 miles away); see *Jury v. Dept. of Rev.*, TC-MD No 060818D, WL 3243109 at *2, n 5 (Oct 31, 2007) (*Jury*) (finding that a 50 mile radius was supported by case law) (citing *Marple v. Comm'r*, TC Summ Op 2007-76, WL 1475269 (2007) (upholding a 45 to 50 mile radius)). The court in *Jury* noted that distances smaller than 50 miles have been accepted as reasonable for purposes of defining a metropolitan area. *Id.* (citing *Wheir*, WL 1921830 (concluding that a 35 mile radius is not unreasonable)). Although the cases of *Williams*, *Porter*, and *Jury* discuss the issue of metropolitan area briefly, this court has not previously reached a holding that defines metropolitan area.

With that in mind, the court finds it appropriate to interpret “metropolitan area” as used in Revenue Ruling 99-7 with reference to the ordinary common meaning of the term. “Metropolitan” is defined as “of, relating to, or constituting a region including a city and the densely populated surrounding areas that are socially and economically integrated with it[.]”¹² *Webster's Third New Int'l Dictionary* 1425 (unabridged ed 2002) (*Webster's*). The definition of “metropolitan” includes, as a verbal illustration, the term “metropolitan area.” *Id.* That definition provides a better test for metropolitan area than strict reliance on distance because it more fully reflects the patterns of human behavior in a given local. Mileage is a factor to be considered; however, the court is not prepared to adopt mileage as the standard for defining metropolitan area.

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¹² The court notes that the United States Tax Court in *Wheir* similarly defined “metropolitan.” *Wheir*, WL 1921830.

b. *Metropolitan area where Austin lived in 2002 and 2003*

Turner is located approximately 9 miles southeast of Salem. The parties agree that Austin lived in Turner during 2002 and 2003, as well as for several years prior and since. (*See Stip Facts at 2.*) Turner is a rural town with a minimal population and very little commerce. There is no dispute that Turner, to the extent it is located in a metropolitan area, may be considered part of the Salem metropolitan area. The court therefore finds that during 2002 and 2003, Austin lived in the Salem metropolitan area.

c. *Metropolitan area where Austin worked in 2002 and 2003*

Before the court can determine whether Austin normally worked in the Salem metropolitan area, it must first decide whether any of Austin's work locations were in that area other than the three months Austin actually worked in Salem during those two years. The parties agree that Austin worked in Salem for approximately three months in 2003, and that his jobs in Portland, Eugene, Gresham, and The Dalles are outside the metropolitan area in which he lives. (*Stip Facts at 7, 8.*) There being no dispute that Salem is within the Salem metropolitan area, the work locations for 2002 and 2003 that remain in question are Hillsboro,¹³ Lake Oswego, and Tualatin.

Austin refers to the "Salem-Turner" metropolitan area as the metropolitan area in which he lives, and uses mileage distances from his home as a guideline to define the reach of that metropolitan area. (*See Ptf's Trial Memo at 1-2, 4.*) For example, Austin argues that locations in Corvallis (where he worked in 1997), Lake Oswego, and Tualatin are within the Salem-Turner

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¹³ The court includes Hillsboro in this discussion because, although the parties stipulated that the work locations in Portland, Eugene, Gresham, and The Dalles are outside of the metropolitan area where Austin lives, Hillsboro was not included in the stipulation. (*See Stip Facts at 7.*)

metropolitan area because none is more than forty miles from his home. (*Id.* at 6, 8; Ptf’s Ex 2-B.) Plaintiffs use this rationale to bolster their argument regarding the metropolitan area where Austin normally worked, *i.e.* by including all of those areas as within the Salem-Turner metropolitan area, Plaintiff increases the amount of time he worked within that area, which becomes helpful to Plaintiff in arguing about the amount of time he “normally” worked in that area. (*See* Ptf’s Trial Memo at 6.) In contrast, Austin argues that job sites between 52 and 76.5 miles from his home are outside the Salem-Turner metropolitan area, making daily transportation to and from those locations deductible. (*Id.* at 4.) The court presumes these include Austin’s 2002 and 2003 work locations in The Dalles, Eugene, Portland, and Gresham and Hillsboro. (*See id.* at 2; Stip Facts at 7.)

The city of Salem is located approximately 46 miles south of Portland. Portland is the largest city in Oregon, with 529,121 residents. Salem, the State capitol, is considerably smaller, with only 136,924 residents. The towns of Lake Oswego and Tualatin are located between Salem and Portland, but are considerably closer to Portland than Salem. Lake Oswego is roughly seven south of Portland (more than 40 miles north of Salem) and to Tualatin is roughly 11 miles south of Portland (over 35 miles north of Salem). Hillsboro is located approximately 18 miles west of Portland and 54 miles north of Salem.

The common understanding of the term metropolitan area, defined above as including a city and the densely populated surrounding areas that are socially and economically integrated with it, places Lake Oswego, Tualatin, and Hillsboro in the Portland metropolitan area rather than in the Salem metropolitan area. Therefore, the only work Austin performed in the metropolitan area where he lived during the tax years at issue was the three months he worked in Salem in 2003.

2. *Normally work*

The court now addresses the question of whether Austin *normally* worked in the Salem metropolitan area during 2002 and 2003. Revenue Ruling 99-7 does not define “normally,” nor have previous decisions of this court. The court therefore looks again to the ordinary common meaning of the term for guidance, and notes that *Webster’s* defines “normally” as “1: in a normal manner * * * 2: commonly, usually[.]” *Webster’s Third New Int’l Dictionary* 1450 (unabridged ed 2002). In *Porter v. Department of Revenue*, this court stated that “Porter had no *regular* work near his residence. Without *normal* work assignments in that general Salem area, those expenses cannot be allowed.” *Porter*, WL 1437493 at *2 (emphasis added).

The parties agree that Austin did not work in Salem during 2002, and that he did work in Salem for approximately three months in 2003. (Stip Facts at 8.) Based on that stipulation, the court holds that the three months Austin worked in Salem in 2003 are not sufficient to qualify as “normally” working in the Salem metropolitan area for 2002 or 2003.

The court will consider, for the sake of argument, whether Austin’s work locations prior to and following the tax years in question establish that Austin normally worked in the Salem metropolitan area for the purposes of tax years 2002 and 2003. Between 1997 and 2001 Austin worked solely for Tigard-based Western Partitions, Inc. (Ptf’s Ex 2-B; Ptf’s Trial Memo at 2.) In a letter from Western Partitions, Inc., the Vice President states that Austin worked at locations in Salem for the following durations: 1997, two months; 1998, eight months; 1999, none; 2000, three months; and 2001, six months. (Ptf’s Ex 2-B). Of the total possible number of 60 months in 1997 through 2001, Austin appears to have worked in the Salem metropolitan area 19 months, or approximately 32% of the time (19 ÷ 60). (*See id.*)

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In 2002 Austin ceased working for Western Partitions, Inc. and instead worked for two different companies, one based in Tigard and the other in Tualatin. (Ptf's' Trial Memo at 2.) In 2003, Austin continued working for the Tualatin-based employer, and also worked for other employers based in Beaverton and Tigard. (*Id.*) Adding his work in the Salem metropolitan area during 2002 (none) and 2003 (three months) to those figures, for a total possible of 84 months, Austin worked in the Salem metropolitan area 22 months, or approximately 26% of the time between 1997 and 2003 ($22 \div 84$). (*See id.*; Stip Facts at 8.) Even looking forward from the tax years in question, and taking into consideration Austin's work in the Salem metropolitan area in 2004 (none), 2005 (8.5 months), and 2006 (1.33 months), out of a possible 120 months Austin only worked in the area between 1997 and 2006 a total of 31.83 months or approximately 26.5% of the time ($31.83 \div 120$).¹⁴ (*See* Ptf's' Trial Memo at 2; Ptf's' Ex 2-A).

Austin argues that the requirement of normally working in a metropolitan area is met if some services are performed within the area of one's home. (Ptf's' Trial Memo at 6.) Austin further argues that his business reasons for living in the Salem-Turner area are (1) that he performs a significant percentage of his work in that area, and (2) that Salem is centrally located between Portland and Eugene, providing the option of commuting to either place.¹⁵ (Ptf's' Trial Memo at 9.) The court recognizes that Austin may have had business reasons for living in the Salem metropolitan area. However having business ties or a business purpose for living in a particular metropolitan area is not a requirement of Revenue Ruling 99-7.

¹⁴ If Corvallis is included in the Salem metropolitan area, which Plaintiffs argue it is, the six months Austin worked in Corvallis in 1997 raises the total percentage of time worked in the Salem metropolitan area between 1997 and 2006 to 31.5% ($37.83 \div 120 = .315$). (*See* Ptf's' Trial Memo at 6; *see* Ptf's' Ex 2-A.)

¹⁵ With respect to Austin's business reasons for living in Turner, Plaintiffs appear to be referring to the United State Tax Court's decision in *Aldea v. Commissioner*, which held that taxpayer had "not established any business reason for living in Yuba City; her decision to live there was entirely personal." TC Memo 2000-136, WL 371549 (2000).

Further, although Austin may have had prospects of working in the Salem metropolitan area, per the policies of his employers, none of his employers between 1997 and 2003 were based in Salem and, as calculated above, less than one third of his work was actually performed in that metropolitan area. (See Ptf's Ex 1; Stip Facts at 2, 4.) Rather, Austin's employers were based in Tigard, Tualatin, and Beaverton, the nearest of which is 37 miles from Salem, and during 2002 and 2003, he worked *outside* of the Salem metropolitan area approximately 85% of the time.¹⁶ (See Ptf's Trial Memo at 2.)

Much like the plaintiff in *Porter*, who similarly lived outside of Salem, Austin does not have *regular* work or *normal* work assignments in the Salem metropolitan area. *Porter*, WL 1437493 at *2. Based on this court's prior interpretation of the term and the definition of "normally," the court holds that the amount of time Austin worked in the Salem metropolitan area fails to reach a level sufficient to constitute commonly or usually working in that area, even when work history for years outside those at issue is considered.

Because the court finds that Austin did not normally work in the metropolitan area in which he lived, and Plaintiffs have not met the requirements of Revenue Ruling 99-7, it is not necessary to discuss further the extent to which Austin's temporary work locations are outside the Salem metropolitan area, nor whether Plaintiffs have sufficiently substantiated the claimed travel expense deductions.

III. CONCLUSION

The court concludes that during 2002 and 2003, Austin lived in the Salem metropolitan area. The court further concludes that the Oregon cities of Lake Oswego and Tualatin are not located in the Salem metropolitan area. Based on these conclusions, the court holds that, in 2002

¹⁶ Plaintiffs reported Austin's work for 2002 and 2003 in weeks, rather than in months, on page 2 of their Trial Memorandum. Of 89 weeks worked in total, 76 were not in Salem; $76 \div 89 = .85$. (Ptf's Trial Memo at 2.)

and 2003, Austin did not normally work in the metropolitan area in which he lived. Although the parties agree that Austin's work assignments in 2002 and 2003 were temporary, under the applicable holding of Revenue Ruling 99-7, only daily transportation expenses for travel to temporary work locations outside the metropolitan area where Austin lives and normally works are deductible. Because Austin did not normally work in the Salem metropolitan area, Plaintiffs cannot deduct Austin's travel expenses for 2002 and 2003. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiffs' appeal is denied.

Dated this _____ day of November 2007.

DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

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 Dan Robinson on November 21, 2007. The Court filed and entered this document on November 21, 2007.