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In this article, the authors examine the definition of tax home for federal income tax purposes and explore the tax consequences that may arise from employees being "away from home" for business travel. They explain that employers that provide flexible worksite arrangements and pay or reimburse employees for business travel face challenges because the rules for when reimbursed expenses are related to business travel and can be excluded from an employee's compensation are complex, often outdated, and derived from fact-specific court decisions. This updates an article first published by KPMG in 2016.

In response to the COVID-19 pandemic, in 2020, organizations across the globe experienced a workplace transformation by expanding and enabling remote work practically overnight.[1] What started as an extraordinary "work from anywhere" experiment is now the norm for many organizations. Today, remote work is commonplace and done through various flexible arrangements to satisfy a variety of business purposes and to attract and retain talent. But the rise in flexible worksite arrangements presents a challenge to employers that provide them and pay or reimburse employees for business travel because the rules for when reimbursed expenses related to business travel can be excluded from an employee's compensation are complex, often outdated, and derived from court decisions with very specific facts and circumstances. Thus, employers must carefully analyze business travel arrangements to determine whether paid or reimbursed travel expenses are taxable or nontaxable to employees.[2] Key to this analysis is the location of an employee's tax home, including whether a personal residence may be considered a tax home.

I. Reimbursement of Expenses

Section 162(a)(2) allows a deduction for certain travel expenses (transportation, meals, lodging, etc.) that are (1) ordinary and necessary, (2) incurred in pursuit of a trade or business, and (3) incurred while "away from home."[3] Employers can reimburse employees for the cost of temporary travel while away from home and can generally exclude the reimbursement, per diem, allowance, and so on from compensation income

[1] KPMG, "American Worker Survey" (Summer 2020). KPMG found that out of 1,400 U.S. workers surveyed in July 2020, 69 percent reported that their productivity had increased, and 79 percent said their quality of work had improved after starting remote work. The survey also found that 64 percent of workers preferred a remote or more flexible work schedule. Also, according to the U.S. Bureau of Labor Statistics, 35 percent of the American workforce teleworked or worked from home in May 2020 because of the COVID-19 pandemic. This is the highest number of remote workers reached during the pandemic. U.S. Bureau of Labor Statistics, "Effects of the Coronavirus COVID-19 Pandemic" (last updated Nov. 2, 2022).

[2] The term "employee" for purposes of this article includes service providers such as independent contractors. For partnerships, there may also be special considerations within relevant partnership agreements.

[3] Section 162(a)(2). While the Tax Cuts and Jobs Act added section 67(g) to the code, disallowing miscellaneous itemized deductions for individuals for tax years beginning after December 31, 2017, and before January 1, 2026, expenses that meet the requirements under section 162(a)(2) that are reimbursed under an accountable plan continue to be excludable from taxable compensation for U.S. tax purposes.

if the expense is a working condition fringe and the accountable plan rules are satisfied.[4]

The problem is that "tax home" as used in section 162(a)(2) does not necessarily have the meaning of residency typical to the word. In fact, a tax home may or may not be the individual's permanent residence. A tax home is generally one's principal place of business; however, an employee's permanent residence may be the tax home if the employee has no other principal place of business.[5] Further complicating the matter is that even though the IRS and the courts have provided decades of commentary and interpretation on the definition of tax home for purposes of section 162(a)(2), the majority of guidance either addresses situations in which an employee is required to regularly perform services at an employer provider location (that is, an office) or was issued when working remotely was not possible because of technological limitations. Thus, it is not entirely clear how the established principles and framework developed through case law and IRS guidance apply in the context of increasingly common remote or hybrid work arrangements.[6] This article reviews the definition of tax home for federal tax purposes and the various permutations of being "away from home" for business travel.

For meal and lodging expense purposes, a taxpayer is considered away from home only if a trip is of a duration or nature that he cannot reasonably be expected to complete the round trip without being released from duty or otherwise stopping (with his employer's tacit or expressed concurrence) the performance of regular duties for sufficient time to obtain substantial sleep or rest.[7] When an employee is traveling on business but is not away from home under these rules, his travel expenses may be personal expenses that are not excludable from gross income and wages if reimbursed by the employer.[8] If the employer does not realize that the employee's tax home is elsewhere or has changed, then reimbursements may be erroneously treated as excludable from income. In this scenario, there is potential exposure for incorrect reporting and withholding.[9]

Daily transportation expenses (that is, transportation expenses incurred by employees going from their residences to a work location, excluding overnight travel) generally do not qualify as away-from-home expenses because they are considered personal commuting expenses under section 162(a)(2). Thus, if an employee is reimbursed for those personal commuting expenses, the amount of the reimbursement is includable in his income as taxable wages. However, some transportation expenses, such as traveling between two business locations or traveling from home to a temporary business location, may be considered a business expense, and reimbursement could be excludable from the employee's income.[10] Thus, the determination of the employee's tax home and the type of travel (commuting versus business travel) is an important step to determine whether reimbursement of travel expenses to the

[4] *See* section 132(a)(3) and (d) and reg. section 1.132-5(a)(1) (describing working condition fringe benefits that may be fully excluded from a service provider's income). Working condition fringe benefits generally include any property or services provided to a service provider to the extent that: (1) if paid by the service provider, the payment would have been allowed as a deduction under section 162; and (2) the expenses are properly substantiated. For purposes of working condition fringes under section 132(a)(3), the term "employee" includes any individual employed by the employer, as well as any partner who performs services for the partnership, any director of the employer, and any independent contractor who performs services for the employer.

[5] *See Johnson v. Commissioner*, 115 T.C. 210 (2000).

[6] *See* American Institute of CPAs, "Request for Guidance in Key Areas Related to Employees Working Remotely" (Aug. 25, 2022) (specifying the need for updated guidance concerning the tax home determination for remote and hybrid service providers).

[7] *United States v. Correll*, 389 U.S. 299, 302-303 (1967); Rev. Rul. 73-529, 1973-2 C.B. 37; Rev. Rul. 75-170, 1975-1 C.B. 60.

[8] *See* section 262(a) (stating that "no deduction shall be allowed for personal, living, or family expenses").

[9] For example, personal commuting expenses incurred for providing any transportation, or any payment or reimbursement to an employee of the taxpayer in connection with travel between the employee's residence and place of employment are nondeductible under section 274(l), except as necessary for ensuring the safety of the employee. Also, qualified transportation fringes (defined under section 132(f)) provided by an employer to an employee are generally not deductible under section 274(a)(4). A monthly limit (up to $300 in 2023 and indexed annually) may be excluded from an employee's income for qualified transportation fringes, but remains nondeductible to employers.

[10] *See* KPMG, "Tax Home: Rise of the Telecommuters" (July 22, 2022) (analyzing when daily transportation expenses incurred between a service provider's residence and work location are deductible under Rev. Rul. 99-7, 1999-1 C.B. 361); ILM 200027047.

employee may be includable or excludable from taxable income.[11]

II. Definition of a Tax Home

The Supreme Court addressed the deductibility of travel expenses and considered the definition of home for this purpose in the seminal case of *Flowers*.[12] In that case, a taxpayer who established his residence in Jackson, Mississippi, was employed by a railroad company headquartered in Mobile, Alabama. The taxpayer declined to move to Mobile and instead set up an office in Jackson, making the trip to Mobile on 60 and 168 days in two separate years. The IRS disallowed the taxpayer's deduction for travel expenses, asserting that his home for tax purposes was Mobile and that he could not deduct expenses for living at a distance from work for his own convenience. The Supreme Court held that a deductible travel expense must be (1) "reasonable and necessary," (2) incurred while "away from home," and (3) "in pursuit of business." The Court determined that the taxpayer's travel was not taken on behalf of the business because the company did not require him to travel to and from Jackson.

The Court declined to define "tax home" in *Flowers*, but the IRS provided its definition in Rev. Rul. 60-189, 1960-1 C.B. 60. The IRS noted that one's "home" for the purpose of section 162(a)(2) is in the vicinity of one's principal place of work or post of duty; a service provider's tax home generally is not determined by reference to the location of his personal residence or family home. In the ruling, the IRS suggested that if a taxpayer chooses to live a great distance away for personal reasons, that finding was enough to support the holding that the travel between the personal residence and the place of business was not business related. Subsequent case law, later revenue rulings, and other guidance have largely supported this IRS interpretation.[13]

Further, if an employee decides not to relocate her personal residence closer to the locale at which she works for personal rather than business reasons, she may not be eligible to deduct the travel expenses resulting from travel to the new place of business.[14] Likewise, an employer reimbursing an employee for those travel, meal, and lodging costs must include the reimbursed costs in the individual's taxable compensation. Employers may not deduct personal commuting expenses incurred for providing any transportation or any payment or reimbursement to an employee in connection with travel between the employee's residence and place of employment under section 274(l), except as necessary for ensuring the safety of the employee, even if included in the employee's income.

The IRS's interpretation of *Flowers* has held up successfully in court, even when the new job location is temporary and the individual is expected to leave that location when the employment position ends. This was the case in *Hantzis*,[15] in which the First Circuit held that a law student in Boston who maintained a home there could not deduct the expenses of traveling to New York for a summer job at a law firm. The court said New York, as the place where the law student earned her income, was her tax home and she had no business reason to maintain an abode in Boston while employed in New York. Thus *Flowers* and *Hantzis* demonstrate that there must be a business rather than a personal purpose for living in one place and working in another.

III. Working From Home

While the IRS and Tax Court have consistently taken the position that an individual's tax home under section 162(a)(2) is the metropolitan area or other general locality of the taxpayer's regular or principal (if more than one regular) place of business, an employee that has no regular place of

[11] In addition, an employer needs to be mindful of state tax considerations. As is the case with any business travel to another state or locality, the employer and employee may also have unexpected withholding and tax in the state of assignment beyond the scope of this article.

[12] *Commissioner v. Flowers*, 326 U.S. 465, 467 (1946).

[13] *See, e.g.*, *Commissioner v. Stidger*, 386 U.S. 287, 290-291 (1967); *Andrews v. Commissioner*, 931 F.2d 132, 136-137 (1st Cir. 1991); Rev. Rul. 73-529; Rev. Rul. 93-86, 1993-2 C.B. 71.

[14] *See Barnhill v. Commissioner*, 148 F.2d 913 (4th Cir. 1945); *Garlock v. Commissioner*, 34 T.C. 611 (1960).

[15] *Hantzis v. Commissioner*, 638 F.2d 248, 249 (1st Cir. 1981).

employment outside the home because of the nature of the individual's employment may still have a tax home under section 162(a)(2).[16] Rev. Rul. 71-247, 1971-1 C.B. 54, says that a tax home may be the place of residence for a taxpayer who has no other principal place of employment (that is, does not work in an office or other employer-provided location outside the home) and has actual duties that will be performed at home.[17] The ruling supports the regular place of abode as the tax home even if the individual travels to several temporary offices or assignments, so long as he is required to return to his abode in between assignments. Thus, expenses related to business trips that require stops for rest away from the home may be deductible to the employer under section 162(a)(2) (and excluded from gross income and wages if reimbursed by the employer).

Further, Rev. Rul. 99-7, 1999-1 C.B. 361, details three situations in which daily transportation expenses incurred in going between a taxpayer's residence and a work location are deductible under section 162(a). The ruling notes that for a residence to be considered a taxpayer's principal place of business, the IRS will also consider whether it is the taxpayer's principal place of business within the meaning of section 280A(c)(1)(A). Generally, the IRS determines a taxpayer's principal place of business under section 280A(c)(1)(A),[18] which governs the deductibility of home office expenses[19] and requires a portion of the home to be used exclusively and regularly for business purposes. The employee must have no other fixed office where they conduct substantial administrative or management activities of the business under that section. The "exclusive use" must be "for the convenience of [the] employer" (that is, for business reasons of the employer, and not for the convenience of the employee). However, some requirements under section 280A(c)(1)(A) may be hard to satisfy for modern-day remote workers. For instance, many remote workers, especially those who live and work in apartments, may find it difficult to satisfy the exclusive use requirement because the surrounding four-walled area in question is used for both business and personal activity, even if that personal use occurs after business hours or only a portion of the room (such as a seat at a dinner table with a computer monitor and printer) is exclusively used for business activity.[20]

However, section 280A(c)(1)(A) is not necessarily determinative of whether the residence is the taxpayer's tax home for purposes of the away-from-home deduction under section 162(a)(2).[21] Thus, a taxpayer's residence may still be considered the individual's tax home for away-from-home purposes even if it fails to satisfy the requirements under section 280A(c)(1)(A).

The determination of whether a taxpayer's residence may be considered the individual's tax home for purposes of the away-from-home rules under section 162(a)(2) would likely be more straightforward if it were directly aligned with the determination of whether a taxpayer's residence is the individual's principal place of business under section 280A(c)(1)(A). However, the decoupling of the two concepts in Rev. Rul. 99-7 provides greater flexibility to remote workers and their employers — if the result is that workers may not be required to satisfy the strict requirements under section 280A(c)(1)(A) for their residence to be considered their tax home for away-from-home purposes.

[16] Rev. Rul. 56-49, 1956-1 C.B. 152; Rev. Rul. 71-247, 1971-1 C.B. 54; Rev. Rul. 73-529.

[17] Rev. Rul. 71-247.

[18] Section 280A(c) was enacted in the Tax Reform Act of 1976 to address the deductibility of home office expenses, generally before workers had commercial access to laptops and personal computers, which are now commonly used to conduct business activities remotely. *See also* AICPA's request for updated guidance regarding remote work, *supra* note 6 (noting that section 280A(c) does not reflect modern work arrangements).

[19] As a result of the TCJA, the home office deduction may only be claimed by self-employed taxpayers for tax years 2018 through 2025. However, daily transportation expenses (that is, transportation expenses incurred by an employee in going from his residence to a temporary work location and back to his residence within a day) that are reimbursed under an accountable plan may still be excluded from gross income if his residence is his principal place of business under section 280A(c)(1)(A).

[20] Even if employees do not meet the requirements under section 280A(c)(1)(A), they may still receive reimbursement from their employer for their home office expenses if they live in California, Illinois, Iowa, Massachusetts, Montana, New Hampshire, New York, North Dakota, Pennsylvania, South Dakota, or the District of Columbia. Employers in these locations may be legally required to reimburse their employees' expenses for home office supplies.

[21] Rev. Rul. 99-7.

IV. Never Away From Home

As a further complication, some service providers move from area to area for their job and do not have (1) a regular place of business, or (2) a regular place of abode in a real and substantial sense.

Rev. Rul. 73-529, 1973-2 C.B. 37, details the factors to consider in determining whether a taxpayer has a regular place of abode in a real and substantial sense to qualify as his tax home or he is itinerant. The three objective factors set forth in this ruling are:

- whether the taxpayer performs a portion of his business in the vicinity of his claimed abode and uses that abode (for purposes of his lodging) while performing that business there;
- whether the taxpayer's living expenses incurred at his claimed abode are duplicated because his business requires him to be away; and
- whether the taxpayer:
  - has not abandoned the vicinity in which his historical place of lodging and his claimed abode are both located;
  - has a member or members of his family (marital or lineal only) residing at his claimed abode; or
  - uses his claimed abode frequently for purposes of lodging.

If the taxpayer can satisfy all three requirements, the IRS recognizes the claimed abode as his tax home for purposes of section 162(a)(2). If only two of the three factors are met, then all facts and circumstances are weighed to determine where his tax home is located. If the taxpayer is unable to satisfy two of the three factors, the IRS will generally regard him as an itinerant worker whose tax home is located wherever he happens to work and who thus has no tax home from which to be away from for purposes of section 162(a)(2). In other words, if taxpayers are itinerant, then travel expenses are not deductible under section 162(a)(2) as away-from-home expenses because those taxpayers cannot be "away from home" — instead, their tax home follows them wherever they travel. Likewise, if a business pays or reimburses an itinerant worker's travel, the amount paid for travel is taxable as compensation.[22]

The three factors of Rev. Rul. 73-529 were considered in *Henderson*,[23] in which the taxpayer, a stagehand for a traveling ice show, had substantial connections with Boise, Idaho, where he resided with his parents between tours. The IRS disallowed the taxpayer's deductions for traveling expenses, asserting that he was itinerant with no tax home. The court said the taxpayer had no business reason for returning to Boise — he worked once as a stagehand for a concert but otherwise was not employed during his time there. Nor did he incur living expenses while there, as his parents paid his expenses, thus not duplicating his living expenses. In light of these two factors, his substantial personal connections to Boise were not enough to make the area his tax home, and the court found he was itinerant.

V. Multiple Places of Work

The determination of a tax home, when an employee has more than one post of duty, is based on old cases and revenue rulings. The IRS allows taxpayers and their advisers to rely on the old rulings but cautions that in most cases, the facts do not support the use of the rulings. We have found that some fact patterns fit within the revenue rulings, but have also seen many that do not. Employers should carefully evaluate hybrid work arrangements to determine which location is a service provider's principal place of business.

According to Rev. Rul. 55-604, 1955-2 C.B. 49, when a taxpayer has two separate posts of duty, each a business necessity, the expenses incurred at the lesser post of duty are deductible (and thus excludable if paid by the employer).[24] This is true even when the taxpayer maintains his family and permanent residence at the lesser post of duty (although in that case, the ruling limits the deduction that may be taken only to "that portion of the family expenses for meals and lodging

[22]Businesses may have sufficient information to conclude that an individual (particularly a temporary employee) is itinerant.

[23]*Henderson v. Commissioner*, 143 F.3d 497, 498-499 (9th Cir. 1998).

[24]Rev. Rul. 55-604; *Maki v. Commissioner*, T.C. Summ. Op. 2018-30 (finding a retiree's residence to be his tax home as he spent more than half the tax year there and received all his taxable income there, including Social Security, interest, dividends, capital gains, and pensions, as opposed to the land on which he cultivated timber).

which is properly attributable to the taxpayer's presence there in the actual performance of his duties").[25]

Rev. Rul. 54-147, 1954-1 C.B. 51, provides three factors for use in evaluating which of two posts of duty is the lesser post:

- the amount of time spent at each post;
- the amount of business actually conducted at each post; and
- the income generated at each location.[26]

None of these alone is determinative; however, revenue rulings focus on the active business need for the taxpayer to work in each location regularly.

Courts have applied this three-factor test as well; for example in *Romer*,[27] the taxpayer maintained a residence in Nashville, Tennessee, where he was employed as an airline pilot. He also maintained aviation activities and an accounting business in Minneapolis, Minnesota. The court determined that because the majority of the taxpayer's income was produced in Minneapolis and he spent less than half of his time in Nashville, his tax home was Minneapolis.

The key to having two posts of duty is to have clear requirements and business needs for the service provider to work in two places that are distant enough to require overnight travel. Merely setting up a home office in the individual's house, or a touchdown office in his hometown, may not rise to the level of a second post of duty. However, if he has a clear, regular job in one town but is also being sent to set up and eventually run a new office, including hiring employees, finding clients, etc., and all parties understand that during the start-up period, which may be over a year, he has two places with two different revenue streams, those facts may support primary and secondary posts of duty for that period.

Example 1: Employer X allows flexibility to many employees. Unless an employee is specified as a remote or an office employee, they are expected to work in an assigned office at least two days each week. An employee can choose where to work the other three days. Some employees choose to work in the office for additional days, but many choose to work from home. Hybrid employees routinely and frequently work at an employer's location. Employees must use a hoteling system to reserve a workspace at the employer's location, and space is not guaranteed. Employees must have adequate workspace available at their primary home to perform services. While it benefits Employer X to have employees in an office for part of the week, there is no business necessity to have them in the office the entire week, and employees provide comparable services at home.

Employer X has a business purpose for allowing flexible, hybrid schedules, including:

- cost savings resulting from smaller office space rental requirements;
- increased productivity of employees from the elimination of their daily commute;
- increased ability to attract and retain employees; and
- support of the company's green initiatives to reduce its carbon footprint.

Based on IRS guidance, the tax home is likely the office's location. The hybrid employees provide services regularly to an assigned Employer X office. This type of arrangement doesn't fit squarely within IRS guidance, and even with business reasons for having an employee work from home frequently, the employer's office is likely the tax home.

Expenses for business travel away from home generally are excluded from an employee's compensation. However, expenses for trips from the employee's residence to the office are likely considered commuting expenses. Certain expenses may be excluded from employee compensation as a qualified transportation fringe under section 132(f)[28] but may be nondeductible by the employer under section 274.

VI. Transfer of Tax Home

A. Temporary Travel

Determining the tax home of an employee who is temporarily traveling for business is often

[25] Rev. Rul. 55-604.

[26] Rev. Rul. 54-147; ILM 200020055.

[27] *Romer v. Commissioner*, T.C. Memo. 2001-168, at 1-2.

[28] See discussion of personal commuting expenses and qualified transportation fringes, *supra* note 9.

a more straightforward analysis. A typical example includes an employee with a regular office who needs to travel on assignments for a few weeks or a few months with a clear expectation that the employee will return to the original, regular office and continue working there. Under section 162(a)(2), if the employee accepts an assignment to another location that is expected to be for one year or less, the assignment is considered temporary, and the employer can reimburse the employee's travel expenses under an accountable plan without treating the expenses as income to the employee.[29]

In a set of IRS revenue rulings, the IRS dealt with some of the issues that arise in temporary assignments. Under Rev. Rul. 93-86, 1993-2 C.B. 71, a taxpayer may deduct expenses (and thus an employer may reimburse those expenses on an excludable basis) related to overnight business travel as long as the assignment is temporary and not indefinite. A temporary assignment to a single location is "realistically expected to last (and does in fact last) for one year or less."[30] If this expectation changes (that is, the assignment is reasonably anticipated to last more than one year) during the course of the assignment, the employment at the other location is no longer considered temporary for this purpose as of the date the expectation changes.[31]

Example 2: Employee works exclusively from her home in Chicago. She is assigned to an office in Nevada for the next 10 months. After six months, the Nevada assignment is extended for an additional 11 months. Employee's assignment may no longer be considered temporary after the initial six months because at that point, there is an extension that is reasonably expected to go beyond 12 months. Starting with the date of the extension, her costs for meals, lodging, and travel paid by her employer must be treated as taxable compensation. The reimbursed costs incurred during the six-month period before the extension would still be excludable from her compensation if reimbursed through an accountable plan.

Companies often wonder about bringing employees "home" for a period and then sending them back to their assignment (or another assignment). The question, as posed by the IRS, is "whether the break in service at the particular location is so significant that employment at the location should be treated as two separate periods of employment rather than one continuous period of employment."[32] Although the IRS has noted that a "brief break" is not enough to make an otherwise indefinite assignment temporary, it has not been helpful in defining a brief break. Chief counsel advice (ILM 200020055) cites *Blatnick*,[33] which says: "Brief interruptions of work at a particular location do not, standing alone, cause employment which would otherwise be indefinite to become temporary."[34]

Another legal memorandum (ILM 200026025) states that a break of three weeks is clearly not enough to cause the 12-month clock to start over (it says that a seven-month period working at the "regular" office would be considered enough of a break). Also, an employee simply on vacation is unlikely to satisfy the requirement of work at the regular place of employment for an extended period.[35] As a practical matter, companies that are aware of these rules appear to typically use a two-to-three-month break period during which the employee works in the original office. Having the employee work at the original office (rather than going on to a new assignment in another city) may prevent a change in the employee's tax home status.

B. Indefinite Assignment

If an employee is hired or transferred to a distant city for an indefinite assignment (that is, an assignment that is realistically expected to last more than one year) even with the same business, the employee's tax home likely shifts to the new assignment location as of the date of hire or

[29] Section 162(a) (flush language).

[30] Rev. Rul. 93-86.

[31] *Id.*

[32] ILM 200027047.

[33] *Blatnick v. Commissioner*, 56 T.C. 1344, 1348 (1971).

[34] ILM 200020055.

[35] *See id.* (explaining that a greater-than-one-month break from working should be ignored in determining whether employment before and after the break in the same location should be considered temporary); *but cf.* ILM 200026025 (noting in examples that a seven-month break may create two discrete periods of employment even when a portion of that break period is spent on vacation).

transfer. As a corollary to the expectation-based definition of temporary described earlier, an employer and employee generally cannot treat the first year of that indefinite assignment in a different location as temporary travel during which the employer can provide tax-free housing and meals.

Mitchell[36] and *Wasik*[37] both provide examples of indefinite assignments. In *Mitchell*, the hospital where the taxpayer worked was closed, and his employment was transferred to a hospital some distance away. The taxpayer rented a trailer in the area of his new employment and returned to the home he shared with his wife on the weekends. When the IRS disallowed a deduction for his travel, the taxpayer argued that his assignment to the new hospital was only temporary. The court determined that it was not. The taxpayer had already worked at the new hospital for two years before the two years for which he took the deduction, and he continued to work there after taking the deduction.

Wasik is a similar case of transferred employment. Because of a series of layoffs and the closing of the nearest facility, the taxpayer was offered a job in a separate city to maintain his employment with Northwest Airlines. In arguing for a travel deduction, the taxpayer maintained that he hoped to be transferred back to his regular place of employment and that his union was bargaining on behalf of his class of workers. The court ruled that the deduction was properly disallowed, pointing out that there was no certainty that the taxpayer would ever actually go back to his former post of duty and had no business reason to maintain his residence there.

C. Sporadic and Infrequent Travel

In chief counsel advice (ILM 200026025), the IRS took up the question of sporadic or infrequent travel and said that if there is an initial realistic expectation that an employee will perform services at a specific work location other than the primary work location for a period exceeding one year, but for no more than 35 workdays (or partial workdays) during each of the calendar years within that period, then employment at that work location may be treated as temporary (rather than indefinite) for a calendar year in which the employee actually works no more than 35 workdays (or partial workdays) at that location. Thus, an employee who expects to, and actually does, perform services at a specific non-primary location for no more than 35 workdays (or partial workdays) in a year may still be considered temporarily away from home, even if the employee expects to perform services at the location for a period exceeding one year. However, as noted by the IRS, these are highly individual factual determinations, and therefore general guidelines are not available.

Further, as is the case with other temporary travel, an assignment may become "indefinite" if at some point, the expectations regarding the number of workdays (or partial workdays) to be performed at the non-primary location during a year change. Note that even if the non-primary location becomes a regular place of business by virtue of an indefinite assignment, one must use the tests promulgated by Rev. Rul. 54-147 to determine the location that constitutes the employee's principal place of business overall to make a proper determination of the individual's tax home.

Example 3: An employee has a tax home at her residence in New Jersey but is assigned to a three-year project that is expected to require her to work six weeks (30 workdays) per year in Memphis, Tennessee. During each year of the assignment, she travels to Memphis only occasionally, for a period totaling three work weeks per year (15 workdays), and so likely falls within the sporadic and infrequent travel exception to the one-year temporary travel limitation. Therefore, payments of, or reimbursements for, transportation expenses incurred in traveling between the residence (the employee's tax home) and Memphis are nontaxable under an accountable plan, even though her assignment in Memphis is expected to exceed one year.

VII. Remote and Hybrid Work

Given the dearth of guidance and case law that directly addresses how to determine the tax home of a remote or hybrid worker for purposes of section 162(a)(2), employers and tax

[36] *Mitchell v. Commissioner*, T.C. Memo. 1999-283.

[37] *Wasik v. Commissioner*, T.C. Memo. 2007-148.

practitioners have no choice but to apply the principles and rules established through decades of IRS guidance and case law to fact patterns that were not contemplated by the IRS or the courts when that guidance was issued or cases decided. Further complicating the matter is that under current guidance, whether an employee's residence may be considered the taxpayer's principal place of business is not an objective determination, but one that is heavily dependent on the facts and circumstances of each case, including whether there are sufficient business reasons for having an employee work from home and maintain residence away from the employer's physical office.

In light of this, many of the new hybrid work arrangements may not result in the employee's residence becoming his tax home, at least under current IRS guidance and case law. For example, if an employee has a designated office space and is asked to be available to come into the office several days a week, even if he is not asked to come in on a particular day and even if the majority of his time is spent working at home, the arrangement is not likely to change his principal place of business to his principal residence under current guidance.

Still, it may be possible for remote or hybrid employees to have their tax home be their personal residence under established guidance and case law. The following factors may be used to determine whether a residence is also a tax home.

Example 4: Remote employees are assigned to their primary residence and not an employer office. Remote employees are required to maintain adequate workspace at their primary residence. Remote employees do not have the option to work in any employer's office except infrequently and on an ad hoc basis for a specific business reason (for example, a quarterly business meeting). Employer X's policy provides that remote workers must work from home and are limited to no more than 35 days in any employer office per year even with a specific business reason. Employer X has two groups of remote workers.

Group 1: Employer X has decided that certain job classifications will be fully remote, such as administrative professionals and IT professionals. Employees hired in these classifications are expected to be fully remote and need permission to work in an office. These services do not require being in an office, and comparable services can be provided from anywhere.

Group 2: Employer X has other nonexecutive employees that it may choose to assign remote employee status. These employees provide comparable services to the employer regardless of location, and an office at an employer location is not necessary. However, the remote assignment is at the discretion of the employer and does not include everyone in the job classification. Further, Employer X does not always follow employee preference regarding work location.

Establishing remote employees in both group 1 and group 2 is for the convenience of Employer X. Employer X has determined that the business purposes for having both groups of employees work remotely include:

- cost savings resulting from smaller office space rental requirements;
- increased productivity of employees with the elimination of their daily commute;
- increased ability to attract and retain employees; and
- support of the company's green initiatives to reduce carbon footprint.

For purposes of expense reimbursement while a remote employee has traveled away from home or for occasional trips to an employer's office, the remote employee's tax home is likely her primary residence, not an employer office location. The employee was not provided with a regular office by her employer, has a business purpose for maintaining the home office for the convenience of her employer, and performs critical parts of her regular business activities at home. If the employee is required to travel to an office, those travel expenses may be reimbursed by the employer and excluded from employee compensation as a working condition fringe benefit under section 132(d), if properly substantiated. There may be a greater risk with the group 2 remote employees if the IRS views initial employee preference for remote work as being for the convenience of the employee and not for the convenience of the employer.

Tax Home Versus No Tax Home

Supportive of Residence as Tax Home	Not Supportive of Residence as Tax Home
Employer determines employee's work location, including whether he may provide services from his personal residence.	Employee is permitted to choose a work location without employer involvement or approval.
Employer approval is primarily based on benefits to the business, such as: • outreach to clients beyond existing locations; • lack of local office to accommodate worker; • desire to reduce office footprint; • increased productivity (when supportable); • proximity to clients, etc.; and • support environmental, social, and governance initiatives. It is not clear whether employee retention and general marketplace recruiting needs alone (as a basis for permitting work from home) would support a tax home.	Employer approval is primarily based on benefits to the employee. Having a business purpose independent of the employee is key to making this a decision for the benefit of the employer, rather than for the personal benefit of the employee.
Eliminating or limiting employee access to an employer's physical office to a limited period (for example, less than two days a week and preferably no more than 35 days a year when possible). It is not clear how the availability of "hoteling" offices (potential temporary office space on a daily or other periodic basis) affects the analysis.	Employee has a physical office space available to freely use on all days at a location within the metropolitan area of his residence.
Require employees to attest to having a designated home office consistent with section 280A.	There is a greater tax risk to employees who don't have a "home office" as noted later. Historically, a home office has been viewed as a distinctly separate location within a home for exclusive business use. It is not clear how the IRS will approach this analysis in a modern setting in which employees frequently work in a commingled space (dining room, spare bedroom, etc.) that may have multiple uses. The IRS allows for a "separately identifiable space" in Pub. 587, "Business Use of Your Home." While a desk in a corner of a room could qualify if it is used exclusively for work, the IRS is strict in its interpretation of "exclusive use" of the space. Prop. reg. section 1.280A-2(f) notes that children's toys or a television in the "exclusive use" zone may be enough to disqualify the space but for special rules pertaining to daycare services.

VIII. Substantiation

The tax-free reimbursement of expenses incurred while traveling away from the tax home depends on the proper substantiation of these expenses by the employee to the employer. Proper substantiation is defined by section 274(d) and requires that the substantiation be made by "adequate records or by sufficient evidence corroborating the taxpayer's own statement." These records or evidence must include:

- the amount of the expense;
- the time and place of the expense;
- the business purpose; and, if applicable,

- the business relationship of the taxpayer to any other individuals for whom the expense was incurred.[38]

In addition to the recordkeeping requirements, taxpayers must retain documents, such as receipts or paid bills, for expenses exceeding $75.[39] To simplify the recordkeeping requirements for substantiation, employers may use per diem rates under an accountable plan in lieu of reimbursing actual expenses.[40] Per diem rates are fixed allowances provided to employees for lodging, meals, and incidental expenses. The IRS provides per diem rates that employers may use each year.[41]

Expense reimbursement arrangements must also satisfy the "accountable plan" substantiation rules under reg. section 1.62-2 and:

- provide the business reason for the expense;
- provide substantiation for the expense reimbursed within a reasonable period; and
- require that the excess beyond actual expense be returned within a reasonable period (for example, if funds were advanced to pay the expense).[42]

IX. Conclusion

The definition of home as used in section 162(a)(2) is not particularly clear, especially in today's highly mobile and telecommuting environment. In the context of reimbursement for travel expenses, a business must determine whether employees have a regular post of duty, more than one required post of duty, a regular place of work in their home, or a change in their tax home. Failure to keep track of an employee's tax home can lead to incorrectly treating payments or reimbursements as tax free when (as applicable) they should be subject to Social Security, Medicare, and federal income tax, and reporting (forms W-2, K-1, etc.). Under IRS rules, if an employer fails to report and withhold on commuting and other personal expenses that should be treated as compensation, the agency is often able to collect the missing withholding from the employer and may collect penalties for the failure to properly report income to the employees. Further, failure to properly identify an employee's tax home can cause an employer to treat payments or reimbursements as taxable and even provide a costly tax gross-up, at the employer's discretion, when it is not necessary with proper planning.[43] ■

[38] Section 274(d). *See also* Notice 2011-72, 2011-38 IRB 407 (IRS will treat employer-provided cellphones used in employer's trade or business as a nontaxable working condition fringe benefit under section 132(d). Thus, the substantiation requirements the employee would otherwise have to satisfy under section 162 are deemed met. Also, the noncompensatory business use of employer-provided cellphones is deemed a de minimis fringe benefit and excludable from employees' income under section 132(a)(4).). *See also* SBSE-04-0911-083, indicating that employees still must satisfy the requirements for business connection and return of excess amount under the accountable plan rules. Employees also must maintain the type of cellphone coverage reasonably related to the needs of the employers' business, and the reimbursement can't be a substitute for a portion of the employees' regular wages.

[39] Reg. section 1.274-5(c)(2)(iii)(A).

[40] *See* Rev. Proc. 2019-48, 2019-51 IRB 1392, at section 1. *See also* Notice 2022-44, 2022-41 IRB 277, updated annually by the IRS.

[41] Rev. Proc. 2019-48, Notice 2022-44.

[42] Reg. section 1.62-2.

[43] The foregoing information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author(s) only and does not necessarily represent the views or professional advice of KPMG LLP.