COMMONWEALTH OF MASSACHUSETTS

**APPELLATE TAX BOARD**

# CHRISTOPHER G. LIBERTINI v.   COMMISSIONER OF REVENUE

Docket No. C331588  Promulgated:

 March 23, 2018

 This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue (“Commissioner” or “appellee”), to abate income taxes owned by and assessed to the appellant, Christopher G. Libertini (“appellant”), for tax years ending December 31, 2012 and December 31, 2013 (“tax years at issue”).

 Commissioner Good heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose and Chmielinski joined her in the decision for the appellee.

 These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

 *Christopher G. Libertini, pro se*, for the appellant.

 *Michael P. Clifford*, Esq., for the appellee.

## FINDINGS OF FACT AND REPORT

On the basis of the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

On April 15, 2013, the appellant filed his 2012 Form 1, Massachusetts Resident Income Tax Return (“income tax return”). On April 15, 2014, the appellant filed his 2013 income tax return. In February of 2015, the Commissioner commenced an audit of the appellant’s income tax returns for the tax years at issue. After a hearing with the Department of Revenue Office of Appeals, the Commissioner determined that the appellant was not entitled to the employee business expense deductions that he had claimed on his income tax returns for the tax years at issue, but further determined that the appellant had established reasonable cause for the waiver of penalties.

By Notice of Assessment (“NOA”) dated February 2, 2016, the Commissioner informed the appellant of the assessments of tax of $1,470 and interest of $179.53 for the 2012 tax year and of tax of $2,039 and interest of $159.61 for the 2013 tax year. Because the NOA also included tax and interest resulting from another tax issue that the parties have agreed not to contest before the Board, the amounts of tax in dispute are $1,458 for tax year 2012 and $2,023 for tax year 2013, together with associated interest.

On February 11, 2016, the appellant timely filed an abatement application with the Commissioner, which the Commissioner denied on May 31, 2016. The appellant seasonably filed an appeal with the Board on July 20, 2016. Based on the foregoing facts, the Board found and ruled that it had jurisdiction over the instant appeal.

During the tax years at issue, the appellant lived with his wife and children at their home in Lowell, Massachusetts. In August of 2006, the appellant began working as an Assistant Professor of History for Dominican College (“Dominican”) in Orangeburg, New York. From August 2006 through the tax years at issue, Dominican offered, and the appellant accepted, 1-year contracts to teach at Dominican. The contracts each covered the academic year of August 15th through August 14th. Each of the contracts for the tax years at issue were made by Dominican as of April 1st of that calendar year, and signed by the appellant no later than April 25th and by the President of Dominican no later than May 2nd of the same calendar year.

In August of 2006, the appellant purchased a condominium in Pomona, New York, located about 12 miles from Dominican. The appellant owned the condominium during the tax years at issue, and he continued to own it at the time of the hearing of this appeal.[[1]](#footnote-1) In both the Fall and Spring semesters during the tax years at issue, the appellant drove the 210-mile trip to Dominican from his home in Lowell, Massachusetts at the start of each week. He stayed at his condominium in Pomona during the week, and drove back to Lowell at the end of each week so that he could spend his weekends in Lowell.

On his Massachusetts personal income tax returns for each of the tax years at issue, the appellant deducted employee business expenses associated with traveling between his home in Lowell and his place of employment in Orangeburg. Specifically, the appellant included deductions for mileage, tolls, meals, and lodging expenses, including amounts for mortgage interest, property tax, and condominium fees associated with the condominium in Pomona. The Commissioner denied those expenses, determining that the appellant’s so-called “tax home” was in Orangeburg, New York, at his place of business, not in Lowell, Massachusetts, at his family’s home. The Commissioner’s determination of the appellant’s tax home is the issue in this appeal.

The appellant testified about his duties as Assistant Professor of History at Dominican. He taught 4 courses each semester, including proctoring the final exams for each course. In addition, the appellant served as an advisor to about 15 to 20 students each semester, which involved reviewing the students’ programs of study, their degree requirements and their grades, and helping them register for upcoming classes. The appellant also held regular office hours in order to consult with students in his classes as well as those whom he was advising.

During the tax years at issue, the appellant also served as Coordinator of Dominican’s History Department. He testified that in this capacity he did the following: managed the history department staff, which included 2 full-time faculty members and 4 to 5 part-time faculty members; designed course schedules for approximately 15 history courses per semester; and oversaw appeals filed by students who wished to dispute a grade or other matters within the history department.

Lastly, during the tax years at issue, the appellant also served as coach of Dominican’s debate team, which involved meeting with the team for approximately 1.5 hours each week and taking them to tournaments 2 to 3 times per semester. By the terms of his contract, the appellant was required to be on campus for a minimum of 20 hours each week during the Fall and Spring semesters, but he estimated that he was typically on campus for more than 20 hours each week. The appellant also performed some of his work for Dominican off-site, at his condominium in Pomona, such as preparing for classes, reviewing student work, responding to e-mails, and other administrative duties.

The appellant testified that Dominican allowed professors to apply for tenure after they had completed 6 years of teaching, and he was in fact granted tenure in August of 2012, during the first of the 2 tax years at issue. The appellant contended that, in contrast to the common notion of tenure as a near-guarantee of indefinite employment, he did not believe that tenure at Dominican provided the same guarantee, as evidenced by the fact that he was still required to enter into annual employment contracts with Dominican.[[2]](#footnote-2) The appellant testified that he understood tenure at Dominican to include a $1,500 increase in base salary and an entitlement to serve on 2 committees, the Hearing Committee and the Grievance Committee.

The appellant also testified about the professional and personal reasons he chose to maintain his family home in Massachusetts rather than New York. Regarding his professional reasons, the appellant served in the Army Reserve at Fort Devens, Massachusetts, a position that required him to report to Fort Devens for 1 weekend per month and 2 additional weeks during the Summer. The appellant also served as an exam grader at Harvard Extension School, but he testified that this work could be performed remotely from any location and did not require him to be physically present at Harvard University. Finally, the appellant was a landlord of the multi-family home where he lived with his family.

Regarding his personal reasons for remaining in Massachusetts, the appellant testified that he wished to spend time with his aging parents, who resided at his home in Lowell. He also felt a personal connection to Massachusetts, where he was born, raised and worked until he was hired by Dominican. As he explained, “I’ve always just -- I like Massachusetts.”

Based on the evidence, the Board found that the location of the appellant’s principal place of business was Orangeburg, New York, where Dominican was located. The Board further found that the appellant did not establish that his position with Dominican, which began in 2006 and continued throughout and after the tax years at issue, was “temporary.” The fact that the appellant purchased a condominium rather than choosing to rent belied his testimony that he believed his employment with Dominican to be temporary. Therefore, as will be explained in the following Opinion, the Board found and ruled that the appellant’s tax home was Orangeburg, New York, not Lowell, Massachusetts. The appellant thus was not entitled to take deductions for traveling expenses -– including mileage, tolls, meals or lodging expenses –- associated with performing his work at Dominican.

Accordingly, the Board issued a decision for the appellee upholding the assessments at issue.

**OPINION**

During the tax years at issue, G.L. c. 62, § 2(d)(2) (“§ 2(d)(2)”) allowed taxpayers to deduct from their gross income the following:

[a]n amount equal to the deductions allowed by Part VI of the [Internal Revenue] Code [(“Code”)] which consist of expenses of travel, meals and lodging while away from home, or expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee; . . . provided, however, . . . the deductions under clauses (i) and (ii) are allowed as itemized deductions under subsection (a) of section sixty-seven of the Code.

Among the Code provisions referenced in § 2(d)(2) is § 162(a)(2), which provides a deduction for “all the ordinary and necessary expenses” associated with “carrying on any trade or business,” including “traveling expenses,” specifically “meals” and “lodging” expenses that are expended “while away from home in pursuit of a trade or business.” The issue in the present appeal was whether the appellant was “away from home” when he incurred the expenses at issue.[[3]](#footnote-3)

The Board looked to Federal cases interpreting “away from home” as that term is used in Code § 162 (a)(2), because “if the State income tax law has incorporated Federal income tax provisions, those provisions should be interpreted as they are interpreted for Federal income tax purposes.” ***Grady v. Commissioner of Revenue***, 421 Mass. 374, 380 (1995) (other citations omitted). “The reference to ‘home’ in section 162(a)(2) means the taxpayer’s ‘tax home.’” ***Roberts v. Commissioner***, T.C. Summary Opinion 2011-127 (2011). The Tax Court “has held as a general rule that the location of a taxpayer’s principal place of business is his tax home, not the location of a taxpayer’s personal residence.” ***Id***. (citing ***Mitchell v. Commissioner***, 74 T.C. 578, 581 (1980)).

“The purpose of the section 162(a)(2) deduction is to mitigate the burden upon a taxpayer who, because of the exigencies of business, must maintain two places of abode and thereby incur additional living expenses.” ***Andrews v. Commissioner of Internal Revenue***, 931 F.2d 132, 135 (1st Cir. 1991) (other citations omitted). “[T]he exigencies of business” is the key concept here, because expenses for commuting to and from work are generally not deductible. ***Fausner v. Commissioner***, 413 U.S. 838, 839 (1973); *see also* ***Commissioner v. Flowers***, 326 U.S. 465, 474 (1946) (“The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors” in determining deductibility of travel expenses.).  The 9th Circuit in ***Coombs v. Commissioner***, 608 F.2d 1269, 1275-76 (9th Cir. 1979) further explained the rationale behind that determination:

When a taxpayer accepts employment either permanently or for an indefinite time away from the place of his usual abode, the taxpayer’s tax home will shift to the new location – the vicinity of the taxpayer’s new principal place of business. In such circumstances, the decision to retain a former residence is a ***personal choice***, and the expenses of traveling to and from that residence are non-deductible personal expenses.

***Id.*** at 584 n.7 (emphasis added). Likewise, the Tax Court in ***Tucker v. Commissioner***, 55 T.C. 783 (1971) held that a teacher who maintained his family home in Tennessee while he worked at teaching positions in Georgia and North Carolina was not entitled to deduct his duplicate living expenses associated with maintaining the residences located closer to his jobs, because his decision to retain his family home in Tennessee was a personal choice, not one made for the exigencies of his business. The Tax Court explained:

If a taxpayer chooses for personal reasons to maintain a family residence far from his principal place of employment, then his additional traveling and living expenses are incurred as a result of that personal choice, and are therefore not deductible. Similarly, if a taxpayer accepts indefinite employment outside the city in which he lives, but he does not change his family residence, the travel to his new place of employment and the additional living costs which he incurs there result, not from his employment, but from his decision not to move his residence.

***Id.*** at 786. *See also* ***Bogue v. Commissioner***, T.C. Memo 2011-164 (holding that, because the taxpayer’s decision of where to live is a personal choice, the expenses of commuting from home to work are not generally deductible as business expenses).

 A notable exception to the bar against deducting commuting expenses is the deductibility of expenses incurred in traveling to a “temporary” work site, which the Commissioner of Internal Revenue defines as one that “is realistically expected to last (and does in fact last) for 1 year or less.” [***Rev. Rul. 99-7***, 1999-1 C.B. at 361](http://www.lexis.com/research/buttonTFLink?_m=7a280a902c33c57266df9d02ae1a50ba&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5bT.C.%20Memo%202011-164%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=248&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1999-1%20C.B.%20361%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzk-zSkAl&_md5=489aa0b2e640a505de0401ad98ca25c0). By contrast, when a taxpayer’s employment is permanent or lasts for an indefinite period of time, it is not considered “temporary,” and the expenses associated with commuting to that job are therefore not deductible.

In ***Commissioner v. Mitchell***, 74 T.C. 578 (1980), the taxpayer, a hospital employee, transferred to a different hospital in Napa, located about 100 miles from his family home, when his previous hospital of employment closed. ***Id.*** at 579. The taxpayer lived in a rented trailer during the work week and he commuted to his family home on the weekends. ***Id***. Based on the fact that, at the beginning of the tax periods, the taxpayer had worked for the hospital for approximately 2.5 years, that he continued to work there throughout the tax periods, and that “the record before us gives us no basis for concluding that [the taxpayer] foresaw, or could reasonably have been expected to foresee, termination of his employment,” the Tax Court concluded that the taxpayer’s employment did not qualify as “temporary.” ***Id***. at 582. Because his work was not temporary, the Tax Court concluded that the taxpayer’s “tax home” was Napa, where the hospital was located.

In the instant appeal, the appellant argued that his employment with Dominican should not be considered permanent, because he must sign a new contract every year, even though he was awarded tenure. However, the Board found that at the very least, the appellant’s employment with Dominican was “indefinite,” not “temporary,” because he “realistically expected” his employment to last – and it did “in fact last” – more than 1 year. *See* ***Rev. Rul. 99-7***.

The evidence showed that the appellant began teaching at Dominican in 2006, and he was still teaching there at the time of the hearing of this appeal, in 2017. He was awarded tenure in 2012, and his annual employment contracts were renewed each year thereafter, throughout the tax years at issue. While the appellant disputed the meaning of “tenure” as used by Dominican, there was no dispute that his yearly contracts starting in April 2012 identified him as “Assistant Professor of History with Tenure.” The evidence did not support the conclusion that the appellant had a reasonable basis to believe that Dominican would choose not to extend his employment at the college. When questioned by the hearing officer as to whether he was aware of any professors at Dominican whose annual contracts were not renewed, he testified that there had been faculty members who have left Dominican. However, he could not point to any examples when the departure was involuntary. Moreover, the Board found that the appellant’s own actions of purchasing a condominium, rather than renting a dwelling, strongly supported the conclusion that the appellant himself expected his employment at Dominican to last for more than 1 year. Accordingly, the Board found and ruled that the appellant’s employment with Dominican did not qualify as “temporary” and therefore, his additional traveling and living expenses related to maintaining his work home in Orangeburg were not deductible.

The appellant further contended that he had business reasons for maintaining his family home in Lowell, and that these business reasons tipped the scale in favor of Lowell being his tax home. These other positions were with Harvard Extension School, the Army Reserve, and as a landlord for his family home. In ***Montgomery v. Commissioner***, 64 T.C. 175, 176 (1975), the taxpayer was a Michigan state legislator who performed his job in different locations, namely at the state capital in Lansing and at his constituent base in Detroit. The Tax Court held that, when a taxpayer has more than one place of business, courts should inquire as to where “most of his work was performed” to determine the location of the principal place of business, and thus the tax home. ***Id***. at 176. The facts of the instant appeal are slightly different from ***Montgomery***, as the appellant performed 4 different jobs – his teaching job at Dominican; his Army Reserve job at Fort Devens; his grading job at Harvard Extension School; and being a landlord for his family home in Lowell. However, the Board found that the Ford Devens, Harvard Extension School and landlord jobs were not the appellant’s main sources of income during the tax years at issue, nor did they occupy an equivalent amount of his time as compared with the appellant’s extensive work as a college professor for Dominican. Moreover, the Harvard Extension School position was not even tied to a specific geographic location, as the appellant admitted that he performed this work remotely. The Board thus found and ruled that the appellant’s secondary jobs did not move the location of his tax home to Lowell.

On the basis of all of the evidence, the Board found that the appellant’s main source of employment was his job with Dominican, and that job was not temporary. The Board further found that his decision not to move his family home was primarily personal. The Board thus found and ruled that the appellant’s “tax home” was Orangeburg, New York. Therefore, the Board found and ruled that the Commissioner properly denied the appellant’s deductions for expenses related to maintaining his tax home in New York.

Accordingly, the Board issued a decision for the appellee in this appeal.

**THE APPELLATE TAX BOARD**

**By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Thomas W. Hammond, Jr., Chairman**

**A true copy,**

**Attest: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Clerk of the Board**

1. The appellant listed the condominium for sale on July 29, 2007, but he subsequently removed the listing on February 3, 2008. [↑](#footnote-ref-1)
2. After he was awarded tenure, the appellant’s employment contracts identified him as an “Assistant Professor of History with Tenure.” [↑](#footnote-ref-2)
3. The appellant did not challenge, and the Board did not address, the proper calculation of the appellant’s expenses. [↑](#footnote-ref-3)