2019 – OTA – 030
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18011227
	)	
JAMAL A. SPELLER	)	Date Issued: January 24, 2019
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellant: Jamal A. Speller

For Respondent: Parviz Iranpour, Tax Counsel

A. ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045, Jamal A. Speller (Appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of $3,486, plus interest, for the 2011 and 2012 tax years.[1] Appellant waived his right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Did Appellant substantiate his deductions for the claimed business use of his home for the 2011 and 2012 tax years?
2. Did Appellant substantiate his deductions for the other claimed unreimbursed employee business expenses for the 2011 tax year?

FACTUAL FINDINGS

1. For most of tax year 2011, Appellant lived in Santa Monica, California, and worked at PricewaterhouseCoopers (PwC). In or around September of that year, he moved to San Bruno, California, and began working for Autonomy, Inc. (Autonomy).

[1] For tax year 2011, the proposed additional tax is $2,714, plus interest. For tax year 2012, the proposed additional tax is $772, plus interest.

2. Appellant timely filed his 2011 California Resident Income Tax Return and claimed deductions totaling $75,286 for unreimbursed employee business expenses. Of these deductions, Appellant attributed $45,156 to expenses incurred when he worked for PwC, the majority of which related to the claimed business use of his home, including a $27,540 deduction for rent and a $3,000 deduction for utilities.[2]
3. It is more likely than not that Appellant used the Santa Monica residence, in whole or in part, for personal purposes.[3]
4. Appellant also claimed other unreimbursed business expenses for the period he worked for PwC, including travel, golf, and meals with clients or potential clients.[4]
5. Appellant attributed $30,130 to expenses incurred after he moved to San Bruno to work for Autonomy. The Autonomy Travel and Business Expense Reimbursement Policy (Autonomy's Reimbursement Policy) outlined its policy and procedures for the reimbursement of eligible expenses. This policy provided employees with the right to request and obtain reimbursement.[5]

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[2] Of the $27,540 deduction for rent, Appellant claimed $13,770 as a direct expense and $13,770 as an indirect expense. Direct expenses are "only for the business part of your home" and are deductible in full, while indirect expenses are "for keeping up and running your entire home" and are deductible based on the percentage of the home used for business. (IRS Pub. 587 (2011) at p. 8.) Of the $3,000 deduction for utilities, Appellant claimed $1,500 as a direct expense and $1,500 as an indirect expense. However, Appellant provided a spreadsheet to FTB which states that his rental payments totaled $13,770 and his utilities totaled $1,500 for the Santa Monica residence in 2011. This contradiction suggests Appellant claimed the same amounts twice.

[3] Appellant asserted he used one hundred percent of his Santa Monica home for business purposes. He reported that this home had a total area of 700 square feet and that he used all 700 square feet regularly and exclusively for business. As explained below, to obtain a home office deduction, the portion of the home used for business must be used regularly and exclusively for business. Appellant presented no evidence to substantiate his claim that he used all of the Santa Monica home regularly and exclusively for business.

[4] Appellant presented no documentation to substantiate any of these claimed expenses. He provided no receipts, no indication of specific dates, and no list of the individuals he met with. Many of the clamed expenses do not indicate the business purpose, or they only list a general purpose such as "training" or "Dinner with Potential Client." Generally, records for substantiating entertainment expenses should include the specific date of entertainment and a description of the "nature of the business discussion or activity" as well as a description of the recipients (names, titles, or other designations) "that shows their business relationship to" the taxpayer. (IRS Pub. 463 (2011) at p. 27.) "For entertainment, you must also prove that you or your employee was present if the entertainment was a business meal." (*Ibid*.) Appellant offered no such substantiation. "A restaurant receipt is enough to prove an expense for a business meal if it" includes all of the following: "name and location," "number of people served," and "date and amount." (*Id*. at p. 27.) But Appellant did not offer any receipts.

[5] In a December 18, 2015 letter, Appellant stated: "Virtually none of my expenses for the year were reimbursed to me (with a few exceptions), mostly because the approval process to get expenses paid was long, tedious, and required several complicated approvals . . . ." In a May 9, 2016 fax, Appellant wrote that his earlier statement may "have been misconstrued" and that, in fact, he was *not* eligible to receive reimbursement. This later

6. The majority of Appellant's claimed Autonomy expenses for 2011 ($19,872 of $30,130) related to the claimed business use of his home. He claimed $17,872 as a deduction for rent and $2,000 as a deduction for utilities.[6]
7. It is more likely than not that Appellant used the San Bruno residence, in whole or in part, for personal purposes.[7]
8. Appellant also claimed a total of $10,258 in unreimbursed travel, mileage, parking fees, and meals and entertainment for the period he worked for Autonomy in 2011. These expenses included staying in hotels during training, dining and visiting with potential clients, dining with coworkers, and golfing with potential clients and coworkers.[8]
9. Appellant reported that during the last five months of 2011, while working for Autonomy, he drove his vehicle 6,410 miles for business and commuted 1,600 miles, all of which he claimed as a business expense.[9]
10. In 2012, Appellant continued to work at Autonomy. Appellant stated that his schedule, when he worked at Autonomy in both 2011 and 2012, consisted of the following:
    - 7:00 a.m. to 10:00 p.m. Monday through Friday;
    - 9:00 a.m. to 9:00 p.m. Saturdays and Sundays; and
    - that he was also available twenty-four hours per day, seven days per week, to provide client services and customer support.

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assertion is not credible because it is contradicted: (1) by Autonomy's Reimbursement Policy; and (2) by Appellant's earlier statement.

[6] Of the $17,872 deduction for rent, Appellant claimed $8,936 as a direct expense and $8,936 as an indirect expense. Of the $2,000 deduction for utilities, he claimed $1,000 as a direct expense and $1,000 as an indirect expense. However, Appellant provided a spreadsheet to FTB which states that his rental payments totaled $8,936 and his utilities totaled $1,000 for the San Bruno residence in 2011. This contradiction suggests Appellant claimed the same amounts twice.

[7] Appellant asserted he used one hundred percent of his San Bruno home for business purposes. He reported that this home had a total area of 900 square feet and that he used all 900 square feet regularly and exclusively for business. He stated that he "did not have any office at Autonomy" and, therefore, claimed to work from his "home office 100% of the time – outside of required office meetings." However, Appellant presented no evidence to substantiate his claim that he used all of the San Bruno home regularly and exclusively for business.

[8] Appellant offered no receipts for these expenses; no specific dates of these expenditures; no description of the individuals he met or dined with; and no description of the nature of the business discussion or activity associated with these expenses.

[9] Appellant did not provide any evidence to substantiate this assertion. Furthermore, commuting expenses are generally not deductible.

11. Appellant changed employers in March 2012. He began working for Navigant Consulting, Inc. (Navigant), and moved to Marina Del Rey, California.
12. Appellant timely filed his 2012 California Resident Income Tax Return and claimed deductions totaling $27,690 for unreimbursed employee business expenses. He claimed those expenses for the business use of his home, and he reported that he incurred those expenses while working for Navigant.[10]
13. It is more likely than not that Appellant used the Marina Del Rey residence, in whole or in part, for personal purposes.[11]
14. For tax year 2011, FTB's auditor allowed $17,500 of the $75,286 claimed as unreimbursed employee business expenses, disallowing the remaining $57,786. FTB issued a Notice of Action (NOA) dated July 5, 2017, which reflected this disallowance. For tax year 2012, FTB's auditor disallowed $8,311 of Appellant's claimed unreimbursed employee business expenses. FTB issued a NOA dated July 5, 2017, which reflected this disallowance. Appellant filed this timely appeal.[12]

DISCUSSION

A taxpayer has the burden of proving respondent's tax determination to be erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow*, *supra*.) The Evidence Code defines "burden of proof" as a party's obligation "to establish by evidence a requisite degree of belief . . . in the mind of the trier of fact." (Evid. Code, § 115.) "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (*Ibid*.) A "preponderance of the evidence" means that a party must establish by documentation or other evidence that the circumstances it asserts are more

[10] Appellant provided a spreadsheet to FTB which contradicts the information reported on his tax return. The spreadsheet indicates that the claimed deductions at issue for 2012 ($27,690) were for the business use of his home when he lived in San Bruno and worked for Autonomy in early 2012, as well as for the business use of his home when he lived in Marina Del Rey and worked for Navigant during the rest of 2012.

[11] Although he claimed one hundred percent business use of his Marina Del Rey home, he presented no evidence to substantiate his claim that he used all of the home regularly and exclusively for business.

[12] In his appeal letter, Appellant disputed FTB's proposed assessments but also proposed a settlement offer. In the appeal acknowledgment letter, Appellant was provided information about how he may pursue a settlement with FTB. There is no evidence Appellant pursued settlement discussions. OTA lacks the statutory authority to compromise Appellant's tax liability in settlement. Instead, this panel must decide the appeal based solely on the facts and law.

likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

No receipts. No substantiation. No deduction. This appeal is about Appellant's failure to meet his burden of proof. Although Appellant claimed deductions for the business use of three consecutive residences, as well as other unreimbursed employee business expenses, he offered neither receipts nor any other form of substantiation sufficient to support his claimed deductions, as is explained in more detail below.

1. Did Appellant substantiate his deductions for the claimed business use of his home for the 2011 and 2012 tax year?

Deductions are a matter of legislative grace, and taxpayers bear the burden of proving entitlement to a deduction. (*Deputy v. du Pont* (1940) 308 U.S. 488; *New Colonial Ice Co., Inc. v. Helvering* (1934) 292 U.S. 435.) Not only do taxpayers bear the burden of proving entitlement to deductions allowed by the Internal Revenue Code, but they also have the burden of substantiating the amounts of claimed deductions. (*INDOPCO, Inc. v. Commissioner* (1992) 503 U.S. 79, 84.) Internal Revenue Code section 280A(a)[13] generally provides that no deduction is allowed with respect to the personal residence of a taxpayer. As an exception to this general rule, the code allows a taxpayer a deduction for the allocable portion of a residence that is *regularly* and *exclusively* used for certain enumerated business purposes. (§ 280A(c)(1).)[14] The legislative history of section 280A explains the exclusive-use requirement as follows:

> Exclusive use of a portion of a taxpayer's dwelling unit means that the taxpayer must use a specific part of a dwelling unit solely for the purpose of carrying on his trade or business. The use of a portion of a dwelling unit for both personal purposes and for the carrying on of a trade or business does not meet the exclusive use test. Thus, for example, a taxpayer who uses a den in his dwelling unit to write legal briefs, prepare tax returns, or engage in similar activities as well for personal purposes, will be denied a deduction for the expenses paid or incurred in connection with the use of the residence which are allocable to these activities.

[13] Statutory references are to the Internal Revenue Code, unless otherwise noted.

[14] California conforms to federal law in the area of unreimbursed employee business expenses. (R&TC § 17201.)

(Sen.Rept. No. 94-938, 2d Sess. (1976), reprinted in 1996 U.S. Code Cong. & Admin. News, pp. 3054-3055; H.R.Rept. No. 94-658, 2d Sess. (1976) reprinted in 1996 U.S. Code Cong. & Admin. News, pp. 3054-3055.)

Appellant's position is built on the following foundational premises: (1) that he used one hundred percent of his Santa Monica residence regularly and exclusively for work related to his employment at PwC; (2) that as soon as he moved to San Bruno, he used one hundred percent of his San Bruno residence regularly and exclusively for work related to his employment at Autonomy; and (3) that after he moved to Marina Del Rey in 2012, he used one hundred percent of his Marina Del Rey residence regularly and exclusively for work related to his employment at Navigant. Exclusive use of the entirety of these three residential units means that Appellant used every single square-foot of space solely for carrying on his trade or business. Appellant deducted all the rent and utilities for tax years 2011 and 2012. Appellant's position implies that he did not use any portions of these residential units for personal purposes.

Appellant's position is unreasonable, unfounded, and lacks credibility. Appellant did not present any evidence to prove that he used one hundred percent of these three residential units *regularly* and *exclusively* for business purposes. Appellant failed to satisfy his burden of proof, i.e., he failed to establish by documentation or other evidence that it is more likely than not to be correct that he used one hundred percent of these three residential units *regularly* and *exclusively* for business purposes.

When a taxpayer fails to demonstrate that a portion of his dwelling was used regularly and exclusively for business purposes, and that the requirements of section 280A have been met, the taxpayer is not entitled to a deduction for the business use of his residence. (*Scully v. Commissioner*, T.C. Memo. 2013-229; see also *Sam Goldberger, Inc. v. Commissioner* (1987) 88 T.C. 1532, 1557.)

Furthermore, except for factual situations involving the use of a room, in part, for the storage of inventory, the "[p]ersonal use of a room or segregated area precludes claiming deductions for business use of that same space . . . ." (*Sievers v. Commissioner* (2014) T.C Memo. 2014-115.) The premise proffered by Appellant—that he used one hundred percent of each of the three residences *exclusively* for business purposes—is unreasonable and unfounded. It is more likely than not that Appellant used the residential spaces in whole or in part for personal use, which precludes claiming deductions for business use of these same spaces.

In summary, because Appellant did not present any credible evidence to demonstrate that he used any portions of his three dwelling units *regularly* and *exclusively* for business purposes, he is subject to the general prohibition of section 280A(a). Accordingly, he is not entitled to his claimed deductions for rent and utilities in 2011 and 2012.

2. Did Appellant substantiate his deductions for the other claimed unreimbursed employee business expenses for the 2011 tax year?

Appellant also claimed a deduction of $25,144 for unreimbursed employee business expenses. Specifically, he claimed $14,886 for unreimbursed employee business expenses while working at PwC and $10,258 for unreimbursed employee business expenses while working at Autonomy. But Appellant failed to substantiate these expenses.

The deductions for certain unreimbursed employee business expenses, including any traveling expense and meals and lodging expense while away from home, are subject to strict substantiation rules. (§ 274(d).) Such deductions shall not be allowed "unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense . . . , (B) the time and place of the travel . . . , (C) the business purpose of the expense . . . , and (D) the business relationship to the taxpayer of the person receiving the benefit." (*Ibid*.) "General or vague proof, whether offered by testimony or documentary evidence, will not suffice. Specificity is imperative." (*Goldberger v. Commissioner* (1987) 88 T.C. 1532, 1558, internal citation omitted.)

The Unites States Tax Court recently discussed these rules:

> To comply with the strict substantiation rules, the taxpayer must substantiate, either through adequate records or through sufficient evidence that corroborates the taxpayer's testimony, the amount of the expense, the time and place the expense was incurred, the business purpose of the expense, and the business relationship of the taxpayer to any others who may have benefited by the expense. To substantiate by adequate records, the taxpayer must maintain an account book, log, diary, or similar record and documentary evidence to establish each element of an expenditure. While a contemporaneous log is not required, a taxpayer's subsequent reconstruction of his or her expenses requires corroborative evidence to support such a reconstruction. The corroborative evidence, coupled with the reconstruction, can elevate that subsequent reconstruction to the same level of credibility as a contemporaneous record.

(*Sievers v. Commissioner* (2014) T.C. Memo. 2014-115, at *9, fns. omitted.)

Appellant's claimed unreimbursed business expense deduction included expenses for visiting, golfing, and dining with clients or potential clients while working for PwC. Similarly, while working for Autonomy, he claimed unreimbursed business expenses for parking, staying in hotels during training, visiting with clients, dining with coworkers, golfing with partners and coworkers, as well as dining and visiting with potential clients.

Significantly, Appellant failed to provide any actual receipts for his claimed expenses. He did not substantiate the amount of the expenses. Appellant submitted a spreadsheet that included general categories and vague descriptions of the business purpose, but this spreadsheet did not identify any specific individuals by name. This spreadsheet also did not include the specific date of the expenditures, simply the month. This spreadsheet was not a contemporaneous log. Appellant's reconstruction of his expenses, using this spreadsheet, did not include any corroborating evidence. Therefore, Appellant's spreadsheet is inadequate and does not meet the strict substantiation requirements of section 274(d).

Additionally, a taxpayer must show the relationship between expenditures and his or her employment. (*Joseph v. Commissioner*, T.C. Memo. 2005-169.) Appellant did not show the relationship between the expenditures of $14,886 and his PwC employment. Likewise, he did not show the relationship between the expenditures of $10,258 and his Autonomy employment.

Lastly, there is a limitation on unreimbursed employee business expenses when the employee could have received reimbursement from the employer. When entitled to reimbursement, the employee's first course of action must be to seek reimbursement. In such situations, for unreimbursed employee business expenses to be deductible, the taxpayer must not have received reimbursement from the employer, when entitled to do so. (*Orvis v. Commissioner* (9th Cir. 1986) 788 F.2d 1406, 1408, affg. T.C. Memo. 1984-533.) This "bright line rule prohibiting deductions for reimbursable expenses . . . forecloses an avenue for tax manipulation by preventing the taxpayer from converting a business expense of his company into one of his own simply by failing to seek reimbursement." (*Ibid*., internal citation omitted.)

Regarding the expenses of $14,886 while working at PwC, it is unclear whether these were reimbursable expenses, and Appellant failed to establish that he did not receive reimbursement from PwC. On the other hand, regarding the expenses of $10,258 while working at Autonomy, Appellant did establish that he did not receive reimbursement from his employer. Appellant presented Autonomy's Reimbursement Policy outlining the policy and procedures for

the reimbursement of eligible business expenses. However, while Autonomy's Reimbursement Policy provided Appellant with the right to request and obtain reimbursement, he did not seek reimbursement. He chose to forgo reimbursement because, in his own words, "the approval process to get expenses paid was long, tedious, and required several complicated approvals . . . ." Appellant may not convert Autonomy's business expense into one of his own simply by not seeking reimbursement.

For the reasons listed above, Appellant has not shown that he is entitled to a deduction for unreimbursed employee business expenses for 2011.

HOLDINGS

1. Appellant did not substantiate his deductions for the claimed business use of his home for the 2011 and 2012 tax years.
2. Appellant did not substantiate his deductions for the other claimed unreimbursed employee business expenses for the 2011 tax year.

DISPOSITION

We sustain FTB's actions in full.

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

DocuSigned by:
Grant S. Thompson
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Grant S. Thompson
Administrative Law Judge

DocuSigned by:
Daniel K. Cho
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Daniel K. Cho
Administrative Law Judge