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2019 – OTA – 082
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

HENRY TASTO

OTA Case No. 18011336

Date Issued: February 25, 2019

OPINION

Representing the Parties:

For Appellant: Erica Comerford, Authorized Representative

For Respondent: Brian Miller, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation (R&TC) Code section 19045, Henry Tasto (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing $1,981 of additional tax plus applicable interest, for the 2012 tax year.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUE

Has appellant demonstrated error in FTB's proposed tax assessment based on disallowed deductions for job-related expenses for the 2012 tax year?

FACTUAL FINDINGS

1. Appellant is employed as a San Francisco firefighter. On his 2012 federal and California income tax returns, Appellant reported a total of $32,020 in itemized deductions, of which $24,660 were miscellaneous itemized deductions.
2. The miscellaneous itemized deductions consisted of tax preparation fees of $428 and a total of $24,232 for the following job-related expenses:
    a. Uniforms and protective clothing: $5,602;
    b. Transportation expenses: $4,242;

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c. Travel expenses: $6,715;

d. Meals and entertainment: $1,728;

e. Cellular telephone expenses: $546;

f. Professional education: $1,550;

g. Equipment and certification expense: $1,800;

h. Union dues: $1,991; and

i. Professional publications: $58.

3. Appellant's adjusted gross income (AGI) for 2012 was $103,404.

4. Appellant subtracted two (2) percent of his AGI ($2,068) in computing the $22,592 deduction claimed ($103,404 x .02 = $2,068; $24,660 - $2,068 = $22,592).

5. FTB notified appellant that his 2012 California income tax return was being examined and asked appellant to substantiate the claimed miscellaneous itemized deductions.

6. FTB disallowed the miscellaneous itemized deductions, claiming that appellant had not properly substantiated amounts or established that the expenses were job-related.

7. FTB determined $2,517 in itemized deductions were allowable, consisting of gifts to charity of $1,880 and personal property taxes of $637. However, since the standard deduction for 2012 was $3,841, FTB allowed the higher standard deduction in arriving at appellant's taxable income for 2012. ($100,335 AGI - $3,841 standard deduction = $96,494). FTB issued a Notice of Proposed Assessment (NPA) determining $1,981 in additional tax due for 2012.

8. Appellant protested the NPA. Appellant argued that the documentation he provided should be sufficient to substantiate his unreimbursed employee expenses. FTB sustained the proposed assessment and issued a Notice of Action.

9. Appellant filed this timely appeal.

DISCUSSION

An income tax deduction is a matter of legislative grace and the burden of showing the right to the claimed deduction is on the taxpayer. (*Smith v. Commissioner* (9th Cir. 2002) 300 F.3d 1023, 1029; *Appeal of James C. and Monablanche A. Walshe*, 75-SBE-073,[1] Oct. 20, 1975.) Furthermore, a taxpayer must retain sufficient records to substantiate claimed deductions.

[1] The Board of Equalization's precedential opinions are available for viewing on the BOE's website: <www.boe.ca.gov/legal/legalopcont.htm>.

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(*Sparkman v. Commissioner* (9th Cir. 2007) 509 F.3d 1149, 1159 (*Sparkman*); Treas. Reg. § 1.6001-1(a).)

An individual performing services as an employee generally may deduct expenses incurred in the performance of such services as itemized deductions. (*Richards v Commissioner*, T.C. Memo. 2014-88.) Employee business expenses can be deducted only to the extent those expenses exceed two percent of the taxpayer's AGI.[2] In addition, to deduct expenses incurred in the performance of services as an employee, a taxpayer must not have the right to reimbursement for such expenses from his employer. (*Ibid.*)

Internal Revenue Code (IRC) section 162(a) authorizes a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[3] (*Roberts v. Commissioner*, T.C. Memo. 2012-197.) A trade or business expense is ordinary for purposes of IRC section 162 if it is normal or customary within the particular trade, business, or industry, and is necessary if it is appropriate and helpful for the development of the business. (*Ibid.*) In contrast, personal, living, or family expenses are generally nondeductible. (*Ibid.*; IRC, § 262.)

The distinction between deductible trade or business expenses on the one hand, and nondeductible personal expenses on the other, is based on a weighing and balancing of the facts and circumstances of each case. (*Irwin v. Commissioner*, T.C. Memo. 1996-490.) With respect to deductions under IRC section 162, the taxpayer bears the burden of proving that an expense was incurred for business, rather than personal reasons. (*Ibid.*) Specifically, taxpayers must show that the expense was incurred primarily to benefit their business, and there must have been a proximate, rather than remote or incidental, relationship between the claimed expense and the taxpayer's business. (*Ibid.*)

In certain circumstances, the taxpayer must meet specific substantiation requirements to be allowed a deduction under IRC section 162. (*Roberts v. Commissioner, supra*; IRC, § 274(d).) IRC section 274(d) requires that the following types of expenses must be substantiated by adequate records or sufficient corroborating evidence: (1) any travel expense, including meals and lodging away from home; (2) any item with respect to an activity which is

[2] Internal Revenue Code, § 67(a).

[3] IRC sections 162, 262, 274, and 280F are generally incorporated into California law at R&TC section 17201.

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of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity; (3) any expense for gifts; or (4) the use of any "listed property," as defined in IRC section 280F(d)(4), which includes passenger automobiles. (*Roberts v. Commissioner*, *supra*.) To qualify for a deduction, the taxpayer must substantiate that expense with adequate records or sufficient evidence to corroborate the taxpayer's statement as to: (1) the amount of the expense or other item; (2) the time and place of the travel, entertainment, amusement, recreation, or use of the property, or the date and description of the gift; (3) the business purpose of the expense or other item; and (4) the business relationship to the taxpayer of the persons entertained or receiving the gift. (*Ibid*.; IRC, § 274(d).)

Appellant has not established the expenses claimed were ordinary and necessary in his employment or provided sufficient documentation to establish the amount each expense. Each item is discussed separately below.

Uniform and protective clothing: $5,602

Appellant lists uniforms and protective clothing as a job-related expense. There is no doubt that uniforms and protective clothing are required within appellant's particular industry. However, the contract between the City of San Francisco and the firefighters' union states that the city will provide "uniforms, protective clothing, and safety equipment required of bargaining unit members . . . ." Therefore, it appears that appellant is not required to purchase these items or is reimbursed under this contract. The contract also states the firefighters "shall maintain their uniforms in serviceable conditions." Appellant has not provided information regarding what expenses were incurred for maintaining his uniform and protective clothing. We cannot estimate the amount of an expense without a basis upon which an estimate may be made. Therefore, a deduction for uniform and protective clothing is not allowable.

Transportation expenses: $4,242

Appellant lists transportation expenses as unreimbursed employee expenses. However, the documents provided did not include a log or other contemporaneous record providing sufficient detail, and corroborating evidence establishing each of the required elements for allowing a deduction for the transportation expenses (i.e., the amount of mileage, the dates and destinations, and the business purpose for each use). (See IRC, § 274(d); *Delima v.*

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Commissioner, T.C. Memo. 2012-291.) For example, appellant provided a statement "49 miles roundtrip 3x weekly for detail." There is no documentation of odometer readings showing the actual miles driven or any dates, logs or specific destinations for each trip. As provided in IRS Publication 463, taxpayers must keep records that show the details of transportation expenses, such as the mileage for each business use, dates of the use of the car, the business destination and the business purpose for each expense. Therefore, there is no basis to determine that any of these expenses are deductible.

Travel expenses: $6,715; Meals and entertainment: $1,728

Appellant lists travel, meals, and entertainment as unreimbursed employee expenses. Travel, meals, and lodging expenses incurred by an employee while away from home for employment are deductible. (IRC, § 162(a); Treas. Reg. § 1.162-2.) Such expenses come under the provisions of IRC section 274(d) and must be substantiated with adequate records or sufficient evidence to corroborate the taxpayer's statement as to: (1) the amount of each separate expenditure; (2) the dates of departure and return and the number of days spent on business; (3) the place of destination by name of city or town; and (4) the business reason or expected business benefit from the travel. (IRC, § 274(d); Treas. Reg. § 1.274-5T (b)(2), (c).) Appellant has not provided any evidence regarding these matters related to the travel, meals, and entertainment expenses. Appellant has provided credit card statements for several months, but nothing is highlighted or marked regarding specific travel, meal, or entertainment expense. Appellant has not provided logs or receipts corroborating the amount of expenditures for each instance of travel, meal, or entertainment event. Appellant's general statement that "travel expenses while away from home overnight for required update classes to Ripon, Oregon, Fresno, and El Salvador is $6,715, meals and entertainment is one-half of $2,160 based on Federal per diem" is not sufficient to meet appellant's burden under the provisions of IRC section 274(d). Therefore, these expenses are not deductible.

Cellular telephone expenses: $546

Appellant deducted cellular telephone expenses because he states his employer required him to have a cellular telephone at all times and calculated the deductible amount as 65 percent of his $70 monthly bill. Such expenses also come under the provisions of IRC section 274(d) (as "listed property") and must be substantiated with adequate records or sufficient evidence to

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corroborate the taxpayer's own statement. (IRC, §§ 262(b), 274(d), 280F(d)(4)(A)(v);[4] Treas. Reg. § 1.274-5T(b)(6)(i)(B).) Appellant does not explain the basis for claiming 65 percent of his cellular bills as a job-related expense, nor does he provide phone records indicating business use and personal use distinctions. A review of the Chase bank statements appellant provided shows "ATT*COMS" phone payments of $57.03 in February, $58.49 in March, $59.69 in June, $58.52 in September, and $58.93 in November. There are no payments to "ATT*COMS" for the other months of the 2012 tax year. If these are in fact for cell phone usage, these amounts do not corroborate appellant's statements of the amount of his phone bill or the amount taken as a deduction. The evidence is not sufficient to meet appellant's burden under the provisions of IRC section 274(d). Therefore, these expenses cannot be deducted.

Professional education: $1,550; Equipment and certification expense: $1,800

Appellant lists professional education as a business expense in the amount of $1,550. Appellant separately lists $1,800 for equipment and certification expenses. IRC section 162 allows for certain educational expenses. Education expenses satisfy the ordinary and necessary requirement of IRC section 162 provided they meet the enumerated tests of Treasury Regulation section 1.162-5. Essentially, educational expenses must maintain or improve skills required in employment and must bear a proximate and direct relationship to taxpayer's trade or business. Appellant provided Certificates of Attendance from the Oregon Fire Instructor's Association Firefighter Safety & Survival Symposium in January 2012, Farm & Machinery Rescue Training, SCBA Confidence/Endurance, Reading Smoke/The Art of First Due, as well as Certificates of Completion for Firefighting Tactics: the Rules of Engagement and Engine Company Fireground Operations from November 15, 2012 in Fresno, California. The training certificates provided establish that these expenses are job-related. However, a review of the educational certificates dated January and November do not have amounts stated for the cost of such activity. Furthermore, appellant has not shown that these expenses were not reimbursed by his employer. We have no basis to determine the amounts of these expenses. As a result, they are deductible.

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[4] IRC §280F(d)(4)(A)(v), referring to "any cellular telephone (or other similar telecommunications equipment)," was repealed in 2010 by P.L. 111-240, for tax years 2010 and later. However, this change did not become applicable for CA purposes until tax year 2015.

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Union dues: $1,991

Appellant lists union dues in the amount of $1,991. IRC section 162 allows for union dues expenses. However, appellant has not substantiated the amount of the deduction for this expense. A review of the December 2016 paystub appellant submitted with his appeal lists "Firefighters L798 Union Dues" with a Year to Date amount of $169.10. However, no documentation or support has been provided for the 2012 tax year. Therefore, we have no basis to determine that the amount of this expense for 2012. Consequently, this expense is not deductible.

Professional publications: $58

Appellant lists professional subscriptions (Fire Engineering and Firehouse Magazine) of $58. IRC section 162 allows for expenses for professional publication and subscriptions. However, appellant has not substantiated the amount of the deduction and has provided no support for the $58 expense. We note "SF Chronicle Subscription" payments appear on appellant's Chase bank statements, but the Fire Engineering and Firehouse Magazine do not appear on any of the bank statements provided. Therefore, we have no basis to determine that the amount of this expense is deductible.

Appellant also has not established the expenses claimed as employee business expenses were ordinary and necessary in his employment or provided documentation to establish each expense.

It is the taxpayer's obligation to maintain adequate records to substantiate a deduction. (See, e.g., *Dorrance v. United States* (9th Cir. 2015) 809 F.3d 479, 484; *Sparkman, supra*, 509 F.3d at p. 1159.) If such evidence is unavailable, it is "the taxpayer, not the government, [that] suffers the consequence." (*Talley Industries Inc. v. Commissioner* (9th Cir. 1997) 116 F.3d 382, 387-388.)

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HOLDING

Appellant failed to demonstrate error in FTB's proposed tax assessment for the 2012 tax year.

DISPOSITION

Respondent's action is sustained in full.

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Sara A Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

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Neil Robinson
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Neil Robinson
Administrative Law Judge

DocuSigned by:
John O Johnson
484A85964FFD4CE...
John O. Johnson
Administrative Law Judge