OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18010771
	)	
CHRISTOPHER M. VELOVICH AND	)	Date Issued: April 22, 2019
MICHELLE R. VELOVICH	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellants: Steven W. Russell, Enrolled Agent

For Respondent: Brian C. Miller, Tax Counsel III

For the Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19045, appellants Christopher M. and Michelle R. Velovich appeal respondent Franchise Tax Board's (FTB) action proposing an assessment of $2,030 in additional tax, plus interest, for the 2012 tax year. The Veloviches waived their right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUE

Are the Veloviches entitled to a deduction for claimed education expenses?

FACTUAL FINDINGS

1. In August 2012, the San Diego Police Department (San Diego P.D.) promoted Mr. Velovich from patrol officer to detective.
2. Mr. Velovich asserts that during 2012 he completed a bachelor's degree in English and began a master's degree in Organizational Leadership. "These two degrees," he states, "while not required for my job as an employee with San Diego Police Department, greatly enhance[d] my training and experience as it relates to my job."

3. Mr. Velovich's college transcript shows that, in 2012, he did not take any organizational leadership courses.[1]
4. A 2012 Form 1098-T from National University shows zero dollars as the payments received from Mr. Velovich for qualified tuition and related expenses.
5. Mr. Velovich's college transcript also shows that he did not receive his bachelor's degree in English in 2012. He received it on January 19, 2014.
6. The Veloviches timely filed a 2012 joint California Resident Income Tax Return. They reported $215,729 as federal and California adjusted gross income (AGI). They claimed $79,354 in federal itemized deductions. This included $26,031[2] in unreimbursed employee expenses and $111 in tax preparation fees, less $4,315 (two percent of their federal AGI),[3] totaling $21,827 in miscellaneous deductions.
7. The Veloviches claimed $70,154 in California itemized deductions by subtracting state and local income taxes of $9,200 from the federal itemized deductions. After applying $70,154 of itemized deductions, they reported $145,575 in taxable income. After applying exemption credits ($208), they reported a total tax of $8,537. Then, after applying income tax withholdings ($8,985), they claimed an overpayment of $448.
8. FTB audited the Veloviches' 2012 return, and in an October 2016 letter, FTB requested documents substantiating their claimed $21,827 in federal miscellaneous deductions.
9. In an expense summary, the Veloviches stated that Mr. Velovich's claimed unreimbursed employee business expenses included $1,946 related to his employment as a San Diego P.D. officer (such as professional dues) and $15,395 in education expenses (i.e., $14,445 for tuition, $700 for books, and $250 for supplies).

[1] Mr. Velovich's college transcript shows he took the following courses in 2012: American Literature I, American Literature II, British Literature I, British Literature II, Creative Writing, English Capstone Course, Introduction to Literature, Literature of the Ancient World, Shakespeare, and Special Needs Students.

[2] On an IRS Form 2106, *Employee Business Expenses*, Mrs. Velovich reported $451 in unreimbursed employee expenses. On a separate IRS Form 2106, she reported $8,239 in unreimbursed employee expenses. On an IRS Form 2106-EZ, *Unreimbursed Employee Business Expenses*, Mr. Velovich reported $17,341 in unreimbursed employee business expenses.

[3] In 2012, FTB allowed miscellaneous itemized deductions only to the extent that their aggregate exceeded 2 percent of AGI. (Internal Revenue Code (IRC), § 67(a).) California generally conforms to this provision. (R&TC, § 17076(a).)

10. FTB issued a Notice of Proposed Assessment (NPA) in February 2017, which disallowed the $21,827 in claimed miscellaneous deductions.[4] The NPA proposed $2,030 in additional tax, plus applicable interest.

11. On May 8, 2017, FTB issued a Notice of Action that affirmed the NPA.

12. The Veloviches timely appealed. On appeal, they conceded that they cannot deduct Mrs. Velovich's disallowed claimed educational expenses of $6,646, which represents $618 in additional tax. Thus, the correct amount of additional tax at issue is $1,412.

DISCUSSION

A taxpayer has the burden of proving FTB's tax determination to be erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Myers*, 2001-SBE-001, May 31, 2001.) Generally, the applicable burden of proof is by a preponderance of the evidence. (Evid. Code, § 115; *Appeal of Estate of Gillespie,* 2018-OTA-052P, June 13, 2018, at p. 4.) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more 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.) However, self-serving, unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See, e.g., *Appeal of Manriquez,* 79-SBE-077, Apr. 10, 1979; *Appeal of Walshe,* 75-SBE-073, Oct. 20, 1975.)

Additionally, 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, but they also have the burden of substantiating the amounts of claimed deductions. (*INDOPCO, Inc. v. Commissioner* (1992) 503 U.S. 79, 84.) Taxpayers must identify an applicable statute allowing a deduction and provide credible evidence that their facts are within the terms of the legal authorities. (*Appeal of Telles,* 86-SBE-061, Mar. 4, 1986.)

Based on the evidence before us, the Veloviches did not meet their burden of proof for two reasons.

[4] FTB determined that Mrs. Velovich claimed student loan interest payments ($6,646) and Mr. Velovich claimed education expenses ($15,395). After disallowing Mrs. Velovich's student loan interest payments ($6,646) and Mr. Velovich's education expenses ($15,395), FTB disallowed the remaining miscellaneous deduction of ($4,101) because it did not exceed two percent of the $215,729 federal AGI ($4,315). (See IRC, § 67; R&TC, § 17076.)

The first reason: they failed to establish that it is more likely than not to be correct that Mr. Velovich actually incurred $14,445 in unreimbursed tuition. The 2012 Form 1098-T shows that National University *billed* him $14,445 for tuition. But there is no evidence he *paid* it. In fact, that Form 1098-T also shows no payments received in 2012 from Mr. Velovich for qualified tuition and related expenses. The Veloviches have not provided any documentary evidence to contradict the university's reporting.

The second reason: even if we accepted that Form 1098-T and Mr. Velovich's written statements as proof of payment, the Veloviches failed to establish that it is more likely than not to be correct that Mr. Velovich's educational expenses had a direct and proximate relationship to his employment.

In discussing an expense's relationship to employment, we begin with federal law, which, under Internal Revenue Code section 162(a), allows a deduction for all ordinary and necessary expenses paid or incurred during the tax year in carrying on a trade or business.[5] The expenses must connect directly with or pertain to the taxpayer's trade or business. (Treas. Reg. § 1.162-1(a).) Generally, performing services as an employee constitutes a trade or business. (Treas. Reg. § 1.162-17(a); see also *O'Malley v. Commissioner* (1988) 91 T.C. 352, 363-364.)

In the case before us, the employee expenses at issue concern education. These individual education expenditures are deductible as ordinary and necessary business expenses if the education: (1) maintains or improves skills required by the individual in his employment or other trade or business; or (2) meets the express requirements of the individual's employer. (Treas. Reg. § 1.162-5(a).)[6] The Veloviches do not argue that San Diego P.D. expressly required Mr. Velovich to enroll in these educational courses. Instead, they claim that these courses maintain or improve skills required by Mr. Velovich in his employment.

To maintain or improve required employment skills, the education must bear a direct and proximate relationship to the taxpayer's employment. (*Boser v. Commissioner* (1981) 77 T.C. 1124, 1131; *Raines v. Commissioner*, T.C. Memo. 1983-125.) Whether there is such a

[5] IRC section 67 limits miscellaneous itemized deductions for individuals to the aggregate of the deductions exceeding two percent of AGI. For the tax year at issue, California generally conforms to IRC sections 67 and 162(a) per R&TC sections 17076(a) and 17201(a), respectively.

[6] However, this regulation does not allow a deduction for expenses associated with (1) minimal educational requirements for qualification in a taxpayer's employment or other trade or business, or (2) for qualification in a new trade or business. (Treas. Reg. § 1.162-5(a).)

relationship is a question of fact. (*Baker v. Commissioner* (1968) 51 T.C. 243, 247.) The taxpayer bears the burden of proving that the educational expenses are deductible. (*Appeal of Grosso,* 80-SBE-089, Aug. 1, 1980.) Education expenses are not deductible merely because a promotion would be more difficult without the education. (*Joyce v. Commissioner*, T.C. Memo. 1969-258.)

As to employment skills, courts have consistently ruled that courses without a direct and proximate relationship to the taxpayer's employment do not qualify as deductible education expenses. For example, in one case, a taxpayer who worked as a policeman deducted education expenses for philosophy courses on the ground that it aided his work as a policeman. (*Carroll v. Commissioner* (1968) 51 T.C. 213 (*Carroll*).) However, the Tax Court held that for the taxpayer to deduct tuition expenses, the tuition expenses must relate directly and proximately to improving his policing skills. (*Id.* at p. 218.) The Tax Court also determined that funding a general college education was a personal expense to prepare the taxpayer for a new trade or business, in that it fulfilled the taxpayer's prerequisites to attend law school. (*Id.* at p. 216.)[7]

Mr. Velovich argued that in 2012 he completed a bachelor's degree in English and began a master's degree in Organizational Leadership.[8] He deducted $14,445 for tuition, $700 for books, and $250 for supplies. To support his deduction, he stated that although his employment with San Diego P.D. did not require these two degrees, they enhanced his training and experience related to that employment. Specifically, Mr. Velovich argued that he testifies in court concerning his training and experience; that he uses his college-learning in daily practical applications on the job; that his two degrees enhanced his ability to get a promotion; that San

[7] See also *Est. of Noonan v. Commissioner*, T.C. Memo. 1969-70 (This case, which also involved a policeman who took college philosophy courses to prepare for law school, was decided in conformity with *Carroll* because of virtually identical facts.); *Warren v. Commissioner*, T.C. Memo. 2003-175 (A minister who took courses that led to a bachelor's degree in human relations did not have deductible education expenses, because the courses qualified petitioner in a new trade or business.); *Menas v. Commissioner*, T.C. Memo. 1969-114 (An IRS agent who took business courses so that he could become a CPA did not incur expenses that directly and proximately maintained or improved his job skills as an IRS agent.); *Spielbauer v. Commissioner*, T.C. Memo. 1998-80 (An attorney deducted expenses for legal seminars and training courses that were directly and proximately related to his employment as a public defender.); *Ciorciari v. Commissioner*, T.C. Memo. 1963-162 (A housing authority employee's graduate level courses, which included courses such as "Housing and Urban Renewal" and "Housing Law and Administration," was directly and proximately related to his employment.); *Jorgensen v. Commissioner*, T.C. Memo. 2000-138 (An English teacher could deduct expenses for education abroad programs because the expenses primarily related to creating a multicultural curriculum.).

[8] The evidence seems to contradict this argument. For example, Mr. Velovich's college transcript shows that, in 2012, he did not take any organizational leadership courses. Also, that transcript shows that he did not receive his bachelor's degree until 2014.

Diego P.D. provided him a $1,000 tuition reimbursement; and that in 2012 he included this reimbursement in gross income.

Furthermore, the Veloviches argued that Mr. Velovich's educational expenses related to his employment because the classes improved his ability to write police reports—a skill essential to his duties as a police officer. While Mr. Velovich's courses focused on English literature, there is no evidence that these courses included the subject of writing in a criminal justice setting; and other than Mr. Velovich's arguments, there is no evidence showing that these courses significantly aided him in writing police reports or testifying in court.[9] The Veloviches also provided a Memorandum of Understanding showing that San Diego P.D. could reimburse him up to $1,000 per year for educational expenses.[10] An employer's reimbursement for education expenses, however, does not determine whether the education expenses are deductible under applicable tax law, as directly and proximately related to maintaining or improving his skills at work—such reimbursement is not binding for tax purposes. (*Torre v. Commissioner*, T.C. Memo. 1984-186; *McIlvoy v. Commissioner*, T.C. Memo. 1979-248.) Even if the undergraduate courses in English and literature enhanced Mr. Velovch's ability to get a promotion, the Veloviches have not established that the courses directly and proximately related to maintaining or improving Mr. Velovich's policing skills.

In summary, the Veloviches did not meet their burden of proof. First, they failed to establish that Mr. Velovich incurred $14,445 in tuition. Second, they failed to establish that his courses had a direct and proximate relationship to his employment.

HOLDING

The Veloviches failed to establish they are entitled to claim a deduction for Mr. Velovich's educational expenses as ordinary and necessary business expenses.

[9] See *Spielbauer v. Commissioner, supra*; *Ciorciari v. Commissioner, supra*.

[10] The fact that San Diego P.D. reimbursed Mr. Velovich $1,000 for tuition in 2012 actually suggests that the Veloviches should not have taken this deduction. For education expenses to be deductible, the taxpayer may not have the right to reimbursement from his employer. (*Orvis v. Commissioner* (9th Cir. 1986) 788 F.2d 1406, 1408, aff'g. T.C. Memo. 1984-533.)

DISPOSITION

We sustain FTB's action 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:
Neil Robinson
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Neil Robinson
Administrative Law Judge