OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010967
MONIQUE RENARD PIERCE	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Melissa I. Gonzalez [1]

For Respondent: Brian C. Miller, Tax Counsel III

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under California Revenue and Taxation Code section 19045, (appellant) Monique Renard Pierce appeals (respondent) Franchise Tax Board's proposed assessment of $3,359 in additional tax, plus applicable interest, for the 2012 tax year. Office of Tax Appeals Administrative Law Judges Tommy Leung, Sara A. Hosey, and Alberto Rosas held an oral hearing for this matter in Sacramento, California, on November 18, 2019. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Whether appellant is entitled to deduct the claimed unreimbursed employee expenses.

FACTUAL FINDINGS

1. Appellant itemized her deductions and reported $36,137 as unreimbursed employee expenses.[2] Appellant claimed $21,279 for vehicle expenses; $1,377 for parking, tolls,

[1] Appellant filed the appeal letter herself, but subsequent representation was provided by various law students from the Tax Appeals Assistance Program, including Maneesh Birdee, Jessica Covarrubias, and Melissa Gonzalez. Ms. Gonzalez represented appellant at the oral hearing.

[2] Unreimbursed employee expenses are miscellaneous itemized deductions that can only be deducted to the extent they exceed two percent of a taxpayer's adjusted gross income. (IRC, § 67(a).) Thus, appellant claimed unreimbursed employee expenses of $39,076, but she deducted the net amount of $36,137.

and transportation; $11,660 for lodging, airfare, and other travel expenses while away from home; $2,700 for other employee business expenses; and $2,060 for meals and entertainment expenses.

2. Respondent sought to audit appellant's 2012 tax return, but appellant did not reply to the audit letter. Respondent then disallowed the entire unreimbursed employee expense deduction of $36,137 and issued a Notice of Proposed Assessment (NPA) proposing to assess $3,359 in additional tax, plus applicable interest.

3. Appellant protested the NPA. In her protest letter, appellant explained that she had changed residences in 2013 and all her receipts and prior tax returns had been unintentionally destroyed. Appellant provided respondent with an excerpt from her employer's reimbursement policy, a 2012 calendar with some notations, a Capital One credit card annual transaction report for 2012,[3] and several spreadsheets.[4]

4. Respondent indicates that it examined the materials submitted at protest and determined that appellant's former employer's reimbursement policy allowed reimbursement for mileage, travel, parking, and meals. Respondent then issued a Notice of Action that affirmed the NPA. This timely appeal followed.

DISCUSSION

Income tax deductions are a matter of legislative grace, and the taxpayer bears the burden of proving entitlement to any deduction claimed. (*INDOPCO, Inc. v. Commissioner* (1992) 503 U.S. 79, 84; *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440.) Generally, determinations set forth in a notice of deficiency are presumed correct, and the taxpayer bears the burden of proving the determinations are erroneous. (*Welch v. Helvering* (1933) 290 U.S. 111, 115; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.)

"[T]he taxpayer generally bears the burden of proving entitlement to a claimed deduction by a preponderance of the evidence." (*Blodgett v. Commissioner* (8th Cir. 2008) 394 F.3d 1030, 1035.) Taxpayers must identify an applicable statute allowing a deduction and provide credible

[3] The Capital One credit card report lists dates, merchant names, cities, and amounts. The total for all charges listed, including both "Dining" and "Gas/Automotive," is $8,380.72. There is no indication on the report of which charges, if any, might have been included in appellant's claimed deduction.

[4] One spreadsheet contains eighteen columns with no headers and shows various amounts for miles, tolls, parking, etc.; another spreadsheet shows city names and dates underneath; and a third spreadsheet lists dates and various amounts for dining and unreimbursed dining (and the total shown for unreimbursed dining is $1,147.16).

evidence that their facts are within the terms of the legal authorities. (*Appeal of Telles* (86-SBE-061) 1986 WL 22792.) This burden requires that taxpayers not only demonstrate the claimed deductions are allowable under a statutory provision, but also substantiate their claimed loss deductions. (*Higbee v. Commissioner* (2001) 116 T.C. 438, 440.) That is, to satisfy this burden of proof, 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.)

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."[5] Traveling expenses while away from home in the pursuit of business are deductible, including meals and lodging "other than amounts which are lavish or extravagant under the circumstances . . . ." (IRC, § 162(a)(2).) A business expense "is ordinary for purposes of section 162 if it is normal or customary within a particular trade, business, or industry, and is necessary if it is appropriate and helpful for the development of the business." (*Roberts v. Commissioner*, T.C. Memo. 2012-197.) By contrast, under IRC section 262, no deduction is allowed for personal, living, and family expenses.

Certain kinds of expenses are not deductible unless the taxpayer provides special documentation and substantiation, in accordance with IRC section 274(d). These heightened substantiation requirements apply to deductions for traveling expenses, activities in the nature of entertainment, gifts, and "listed property" as defined by IRC section 280F(d)(4), which includes automobiles. Such deductions require substantiation by adequate records or sufficient evidence showing: (1) the amount of the expense; (2) the time and place of the travel or the date and description of the entertainment or gift; (3) the business purpose of the expense; and, (4) the business relationship to the taxpayer of the persons receiving the benefit. (IRC, § 274(d).) The substantiation requirements for compliance with IRC section 274 are stricter than those required for other kinds of deductions, particularly the deduction of the ordinary and necessary expenses found in IRC section 162. (*D. A. Foster Trenching Co. v. United States* (Ct. Cl. 1973) 473 F.2d 1398.) The tax court has held that "[r]eceipts often fail as proof because they don't show any particular business purpose." (*H & M, Inc. v. Commissioner*, T.C. Memo.

[5] IRC sections 162, 262, 274, and 280F are generally incorporated into California law by Revenue and Taxation Code section 17201.

2012-290, at fn. 17.) Expenses related to other kinds of deductions can sometimes be estimated under the "Cohan rule" that was announced in *Cohan v. Commissioner* (2d Cir. 1930) 39 F.2d 540, but such estimation is not consistent with the more stringent requirements for deductions under IRC section 274.

Further, an expense is not "necessary" when an employee has a right to reimbursement for expenditures related to his or her status as an employee but fails to claim such reimbursement. (*Orvis v. Commissioner* (1986) 788 F.2d 1406; *Coplon v. Commissioner* (6th Cir. 1960) 277 F.2d 534.) In *Coplon*, the court stated, "Simply by failing to seek reimbursement, [the taxpayer] cannot convert business expenses of the corporation into his own business expenses." (*Coplon v. Commissioner, supra,* at 535.)

We have no basis to overturn respondent's determination to disallow the deduction for appellant's unreimbursed employee expenses.

Appellant explains that her receipts were "unintentionally destroyed," but she has not provided evidence that satisfy her burden of proving entitlement to the claimed deductions by a preponderance of the evidence. Appellant provided little or no information about the individual expenses that she collectively deducted on her tax return. Appellant did not prove, by a preponderance of the evidence, that the claimed individual expenses were "ordinary and necessary" as that phrase is used in IRC section 162.

Without additional evidence, the documents that appellant has provided are not helpful and do not satisfy her burden of proof. For example, the spreadsheet showing cities and dates does not indicate how those trips related to her employment, who she met with, what her actual expenses were, whether she stayed overnight, etc. The Capital One credit card report shows charges that total $8,380.72 for the whole year (compared to $39,076 in reported expenses), but it does not indicate which of the expenses listed related to appellant's employment, which expenses were included in the deduction claimed on appellant's tax return, which expenses might have been lavish or extravagant under the circumstances, etc.

Furthermore, both parties have discussed the reimbursement policy of appellant's former employer and whether appellant could have been reimbursed for her expenses by filing reimbursement claims. The general rule is that employee expenses are not considered "necessary" under IRC section 162(a) when an employee could have been reimbursed for an expense but failed to file a claim. (*Orvis v. Commissioner, supra.*)

At the oral hearing, appellant testified that her employer's Roseville office "consistently struggled to stay profitable" and that "it was common practice in that climate not to submit expenses for failed pursuits in order to keep the overhead low." She testified that her "supervisor never asked [her] to submit reimbursement requests for any dead-end pursuits." Appellant also testified that, despite her attempts, she was unable to locate her fellow sales representatives to corroborate her story. But aside from appellant's own testimony, there is no other evidence—in the form of either corroborating documentation or witnesses—proving that appellant did not seek reimbursements from her employer due to this unwritten "common practice."

Therefore, appellant did not establish by documentation or other evidence that the circumstances she asserts are more likely than not to be correct.

HOLDING

Appellant has not shown that she is entitled to deduct any unreimbursed employee expenses for the 2012 tax year.

DISPOSITION

We sustain respondent's action.

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

We concur:

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

Date Issued: 1/28/2020