OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19034401
W. MAREK	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: W. Marek

For Respondent: Carolyn Kuduk, Tax Counsel III

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

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045,[1] W. Marek (appellant) appeals an action by the respondent Franchise Tax Board (FTB) proposing additional tax of $3,124 and applicable interest for the 2013 taxable year.

Appellant waived his right to an oral hearing, so this matter has been decided based on the written record.

ISSUE

Whether appellant has established that he is entitled to the Job Expenses and Miscellaneous Deductions that he claimed for the 2013 taxable year.

[1] All section references are to laws and regulations operative for the 2013 taxable year.

FACTUAL FINDINGS

1. Appellant filed a California income tax return (Form 540) for 2013, claiming itemized deductions of $44,031; these deductions included $33,702 for Job Expenses and Certain Miscellaneous Deductions.
2. FTB audited appellant's tax return and requested documentation to substantiate the $33,702 deduction that appellant claimed for Job Expenses and Certain Miscellaneous Deductions. Appellant provided FTB with a spreadsheet showing mileage numbers, dates, starting and ending addresses, names for destinations, numbers for "Meals/Entertainment," and numbers for "travel exp. Overnight"; there is also a column entitled "Purpose of Travel."[2] Appellant also provided a separate spreadsheet showing twelve monthly parking fees of $80 at an address on West Century Boulevard.
3. FTB issued a Notice of Proposed Assessment (NPA) that disallowed appellant's deduction of $33,702 for Job Expenses and Certain Miscellaneous Deductions and proposed to assess $3,124 in additional tax, plus applicable interest.
4. Appellant protested the NPA, stating that he had "previously provided a detailed log notating these expenditures." Appellant also submitted the following items:
   - An e-mail message dated March 13, 2018, from the Vice President for Human Resources at Pape-Dawson Engineers, Inc., in San Antonio, Texas, stating that she had searched their files and found no record of appellant's resume or office visit in 2013;
   - An e-mail message dated February 10, 2018, from R. Wass, apparently from Tri-Sun's Engineering, Inc., stating that his firm had no records of appellant's application for employment or visit to Lake Havasu in 2013;
   - A receipt for $624.62 from the Sheraton Austin Hotel for appellant's three-night stay from March 7 through 9, 2013;
   - A credit card receipt from Chase Sapphire Preferred showing a $6 charge described as "All Star Parking LAX" dated July 1, 2013; and

[2] As a typical example from appellant's spreadsheet, the first entry shows 1,455 under Mileage Count, 1/4/2013 under Date, appellant's address under Start Point, an address in Dallas, Texas, under End Address, Kimley-Horn under Destination, 502 under Meals / Entertainment, and no entry under "travel exp. overnight." The next line shows 1,455 under Mileage Count, 1/7/2013 under Date, the same address in Dallas, Texas, under Start Point, appellant's address under End Address, "Return from Above" under Destination, no entry under Meals / Entertainment, and 722 under "travel exp. overnight."

- A receipt for $65.37 from the Home Depot in Hawthorne, California, for a "measure wheel" purchased on May 9, 2013.

5. FTB replied to appellant, requesting additional information and documentation, such as evidence corroborating "your schedule showing that you indeed incurred these job search expenses. Documentation may include but [is] not limited to letters or emails denying your candidacy for the job positions applied."
6. In response, appellant submitted the following items:
   - A letter from A. Espolnoza P.E. at LJA in Houston, Texas, dated December 19, 2013, stating, "We ended up moving forward with another candidate, but we would like to thank you for talking to our team members as well as giving us the opportunity to learn about you, your skills, and your accomplishments." An e-mail message dated October 14, 2013, from Justin Tinkle at Lamar Engineering stating "unfortunately, we are not accepting candidates at this point in time."
   - An e-mail message dated October 9, 2018, from the CAD Manager at Hoskin Ryan, stating "We don't keep them very long," in response to appellant's e-mail message on the same date asking, "I was wondering how far back your career/job application records go?"
7. FTB then issued a Notice of Action that affirmed the NPA.
8. During this appeal, appellant submitted a letter dated February 12, 2019, from his employer, The HNTB Companies, stating that "HNTB does not cover parking expenses for employees. Instead employees can use commuter and parking benefits through WageWorks to set aside money each paycheck to pay for these expenses."

DISCUSSION

Burden of Proof

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 evidence that their facts are within its terms. (*Appeal of Telles* (86-SBE-061) 1986 WL 22792.) To satisfy the 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.)

Unreimbursed Employee Expenses

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] Traveling expenses while away from home in the pursuit of a trade or 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 [IRC] 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. The cost of commuting to a place of business or employment is treated as a personal expense and is not deductible. (Treas. Reg. § 1.262-1(b)(5).)

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

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

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 United States 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. 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 superseded by the more stringent requirements for deductions under IRC section 274(d). (*Haskins v. Commissioner*, T.C. Memo. 2019-87; Treas. Reg. §1.274-5T.) 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* (9th Cir. 1986) 788 F.2d 1406, 1408; *Coplon v. Commissioner* (6th Cir. 1960) 277 F.2d 534 (*Coplon*).) 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.)

In this appeal, appellant has not provided enough information and documentation to substantiate the Job Expenses and Miscellaneous Deductions that he claimed for 2013. The spreadsheet showing mileages, dates, addresses, "Meals / Entertainment," and "travel exp. overnight" is not sufficient to show the business purpose of each trip. The spreadsheet alone might be helpful as a summary, but it is not sufficient as evidence to prove that appellant personally incurred the expenses listed. The expenses listed in the spreadsheet are not corroborated by receipts, bank statements, canceled checks, credit card statements, invoices, job applications, correspondence from potential employers, or any other documentary evidence. Appellant cited Treasury Regulation section 1.274–5T concerning the definition of adequate documentation;[4] Treasury Regulation section 1.274–5T(c)(2)(i) mentions a "log", but also requires "documentary evidence" as part of the definition of "adequate records." We have the log, but we are missing the documentary evidence. We do not have sufficient evidence to determine if the expenses listed were ordinary and necessary, and we cannot determine whether they were lavish or extravagant under the circumstances. Appellant explained that he "was

[4] Appellant quoted a portion of Treasury Regulation section 1.274–5T(c)(2)(i). This federal regulation states, in pertinent part, "To meet the 'adequate records' requirements of section 274(d), a taxpayer shall maintain an account book, diary, log, statement of expense, trip sheets, or similar record (as provided in paragraph (c)(2)(ii) of this section), and documentary evidence (as provided in paragraph (c)(2)(iii) of this section) which, in combination, are sufficient to establish each element of an expenditure or use specified in paragraph (b) of this section."

actively searching for a new job within my current field" and his expenses related to this job search, but the spreadsheet alone is insufficient to substantiate that statement. The spreadsheet does not comply with the strict substantiation requirements for compliance with IRC section 274.

We appreciate that appellant sought to provide documentation to substantiate his job search expenses. However, most of the documents that appellant provided are not helpful, such as the e-mail messages from potential employers stating that they had no records of appellant's visits or job applications. Appellant's receipt for $624.62 from the Sheraton Austin Hotel is sufficient to show that appellant personally incurred a lodging expense for a three-night stay from March 7 through 9, 2013, but the business purpose of that expenditure is not obvious, and it has not been explained or corroborated. We note that appellant's spreadsheet indicates a trip on these dates to "Pape-Dawson Engineers, Inc." in Austin. Appellant has provided an e-mail message dated March 13, 2018, from the Vice President for Human Resources at Pape-Dawson Engineers, Inc., in San Antonio, Texas, stating that she found no record of appellant's visit in 2013. Appellant's receipt alone is not quite enough to prove that his trip to Austin was related to a job search in his current field.

We believe that appellant's receipt from the Home Depot in Hawthorne for a "measure wheel" for $65.37 purchased on May 9, 2013, is sufficient to show that appellant personally incurred this expense during the taxable year. This item does not appear to be "listed property" or otherwise subject to the strict substantiation requirements of IRC section 274. However, appellant has not explained its business purpose or how it might possibly relate to his job search within his current field. If the device was purchased for appellant's current job, rather than for a job search, then appellant has failed to show whether he sought or received reimbursement from his current employer (or why no reimbursement was sought), so we cannot determine whether the purchase was "necessary" as that term is used in IRC section 162.

Appellant has provided a spreadsheet listing monthly parking expenses and a letter from his employer stating that they do not cover parking expenses for employees. These items are insufficient to prove that appellant personally incurred these expenses during the taxable year; in addition, the primary problem is that the parking charges appear to be commuting expenses that are not deductible, as previously explained. Appellant has not shown that these parking expenses are somehow connected to his job search and that they are unrelated to his commute to his present place of employment. Appellant also provided a credit card receipt from Chase Sapphire

Preferred showing a $6 charge described as "All Star Parking LAX" dated July 1, 2013. This is sufficient to prove that appellant incurred a parking expense, but the business purpose is not obvious, the trip is not mentioned on appellant's spreadsheet, and we have no information or documentation explaining it. If this parking expense is related to appellant's current job, rather than his job search, then appellant failed to show whether he sought or received reimbursement from his current employer, or why he did not seek reimbursement.

Appellant claimed $500 for tax preparation fees, which was included in the disallowed deduction of $33,702 for Job Expenses and Certain Miscellaneous Deductions. Appellant has not provided any sort of evidence to show that he incurred this expense.

Therefore, we have no basis to overturn respondent's proposed assessment.

HOLDING

Appellant has not established that he is entitled to the Job Expenses and Miscellaneous Deductions that he claimed for the 2013 taxable year.

DISPOSITION

FTB's proposed assessment is sustained.

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Richard Tay
F8E81582726F448...
Richard I. Tay
Administrative Law Judge

Date Issued: 6/18/2020