

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19054790
N. STEL)
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OPINION

Representing the Parties:

For Appellant: N. Stel

For Respondent: Sarah J. Fassett, Tax Counsel

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, N. Stel (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$3,901, plus interest, for the 2013 tax year.

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

ISSUES

1. Whether appellant was provided with proper notice of FTB’s proposed assessment.
2. Whether FTB’s proposed assessment is barred by the statute of limitations.
3. Whether appellant has shown error in FTB’s proposed assessment of additional tax.

FACTUAL FINDINGS

1. Appellant filed a timely 2013 California personal income tax return on March 20, 2014, listing an address in Fairfield, California. Appellant’s return reported a refund due of \$5,965, which FTB refunded.
2. On her 2013 federal Schedule A, appellant claimed “job expenses and certain miscellaneous deductions” totaling \$44,953 (line 27), which consisted of unreimbursed

- employee expenses of \$47,982 and a subtraction of \$3,029 for two percent of adjusted gross income (AGI).
3. With respect to her claimed unreimbursed employee expenses of \$47,982, appellant filed a federal Form 2106 (Employee Business Expenses), listing her occupation as “Software Sales” and claiming vehicle expenses of \$9,707, parking, tolls, and transportation expenses of \$1,500, travel expenses of \$800, business expenses (excluding meals and entertainment) of \$35,725, and meals and entertainment expenses of \$250.
 4. Subsequently, FTB issued a Notice of Proposed Assessment (NPA) dated March 22, 2018, which proposed the following adjustments: disallowed job expenses and certain miscellaneous itemized deductions of \$44,953; disallowed itemized deductions of \$900 (consisting of \$500 in non-cash gifts to charity and \$400 in personal property taxes); and an adjustment of \$3,906 for an allowance of the standard deduction. The NPA proposed additional tax of \$3,901, plus interest.
 5. Appellant timely protested FTB’s proposed assessment.
 6. FTB issued a Notice of Action dated April 19, 2019, affirming the NPA.
 7. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant was provided with proper notice of FTB’s proposed assessment.

In general, notices sent by FTB to a taxpayer’s last known address are presumed to have been received. (*Appeal of Floria* (83-SBE-003) 1983 WL 15390.) If a taxpayer claims that he or she did not receive the notice, the taxpayer bears the burden of proving the notice was not mailed to the taxpayer’s last known address. (See *Grenciewicz v. Commissioner*, T.C. Memo. 1990-597.) What is relevant is FTB’s knowledge of the taxpayer’s last known address, rather than the taxpayer’s actual most current address. (See *Reding v. Commissioner*, T.C. Memo. 1990-278.) If the taxpayer moves after filing his or her return, the taxpayer must take the necessary steps to ensure receipt of his or her mail. (*Appeal of Schwyhart* (75-SBE-035) 1975 WL 3519.)

For a notice to be proper, the law provides that it is not necessary for FTB to prove the notice was received by the taxpayer. (See *United States v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810.) It is sufficient that the notice was mailed to the taxpayer’s last known address and it

was not returned to FTB as undelivered. (*Ibid.*) As a general rule, a taxpayer's last known address is the address that appears on the taxpayer's most recently filed tax return, unless FTB is given clear and concise notice of a different address. (R&TC, § 18416(c); *Appeal of Bryant* (83-SBE-180) 1983 WL 961596.)

Here, the NPA was mailed to appellant at an address in Fairfield, California (the last address of record per FTB's database), and the appeal file contains no evidence that the NPA was returned by the Post Office as undelivered. Accordingly, the evidence in the appeal record supports a finding that appellant was provided with proper notice of FTB's proposed assessment.

Issue 2: Whether FTB's proposed assessment is barred by the statute of limitations.

In general, FTB must issue a proposed assessment within four years of the date the taxpayer files his or her California return. (R&TC, § 19057(a).) For purposes of R&TC section 19057, returns filed before the original due date of a personal income tax return are considered as filed on the original due date. (R&TC, § 19066(a).)

Here, appellant's 2013 California income tax return was timely filed on March 20, 2014, which was before the original due date, determined without extension, on April 15, 2014. Because the NPA was issued on March 22, 2018, which was less than four years from the original due date of appellant's tax return on April 15, 2014, the NPA was issued timely.

Issue 3: Whether appellant has shown error in FTB's proposed assessment of additional tax.

The taxpayer bears the burden of proving that FTB's determinations are erroneous. (See *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) Unsupported assertions cannot satisfy the taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Tax returns are not proof of the statements made therein. (*Bruno v. Commissioner*, T.C. Memo. 1990-109.)

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."¹ (*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

¹ IRC sections 162, 274, and 280F are generally incorporated into California law at R&TC section 17201.

business. (*Ibid.*) In contrast, personal, living, or family expenses are generally nondeductible. (*Ibid.*; IRC, § 262.)

In certain circumstances, the taxpayer must meet specific substantiation requirements to be allowed a deduction under IRC section 162. (*Roberts v. Commissioner, supra.*) For example, 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 in the nature of entertainment, amusement, or recreation; (3) an expense for gifts; or (4) the use of “listed property,” as defined in IRC section 280F(d)(4), which includes passenger automobiles. (*Roberts v. Commissioner, supra.*) To qualify for a deduction when IRC section 274(d) is applicable, the taxpayer must substantiate an expense with adequate records or sufficient evidence to corroborate the taxpayer’s own 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).)

A common law employee is not entitled to claim business expenses on Schedule C (*Feaster v. Commissioner, T.C. Memo. 2010-157.*) An individual performing services as an employee generally may deduct expenses incurred in the performance of such services as itemized deductions on Schedule A. (*Richards v. Commissioner, T.C. Memo. 2014-88.*) However, unlike Schedule C deductions, Schedule A deductions are subject to various limitations. (*Ibid.*) For example, employee business expenses can be deducted only to the extent those expenses exceed two percent of the taxpayer’s AGI under IRC section 67(a). (*Ibid.*) Further, to deduct expenses incurred through the performance of services as an employee, a taxpayer must not have the right to reimbursement for such expenses from his employer. (*Ibid.*)

Appellant’s sole argument in relation to the additional tax is that she is unable to locate her applicable financial records due to a fire in which she lost everything. Here, appellant has not provided any evidence (e.g., invoices, receipts, cancelled checks, bank statements, insurance forms) that her financial records were lost in a fire and that the alleged expenses were actually incurred/paid. Further, appellant has not provided any evidence that the alleged expenses represent deductible employee business expenses, as opposed to personal expenses. Also,

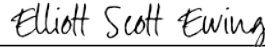
appellant has not provided any evidence that the alleged unreimbursed employee business expenses were not subject to a right of reimbursement from her employer. (*Richards v. Commissioner, supra.*) In addition, as indicated above, IRC section 274(d) requires that various types of expenses must be substantiated by adequate records or sufficient corroborating evidence, which appellant has not provided.

HOLDINGS


1. Appellant was provided with proper notice of FTB’s proposed assessment.
2. FTB’s proposed assessment is not barred by the statute of limitations.
3. Appellant has not shown error in FTB’s proposed assessment of additional tax.

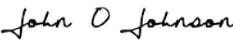
DISPOSITION

FTB’s action is sustained.

DocuSigned by:

 Elliott Scott Ewing
 Administrative Law Judge

We concur:

DocuSigned by:

 Kenneth Gast
 Administrative Law Judge

DocuSigned by:

 John O. Johnson
 Administrative Law Judge

Date Issued: 2/28/2020