

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19054796
O. NELSON AND)
M. NELSON)
_____)

OPINION

Representing the Parties:

For Appellants: Darla F. Hetrick, EA
For Respondent: Desiree Macedo, Tax Counsel

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, O. Nelson and M. Nelson (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,879.85 for the 2012 taxable year.

Appellants waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Have appellants shown that they are entitled to claim unreimbursed employee business expenses of \$23,443 for 2012?

FACTUAL FINDINGS

1. Appellants filed 2012 joint federal and California tax returns reporting deductions for unreimbursed employee expenses of \$23,443.¹ Claimed expenses included vehicle expenses of \$1,654, meals of \$8,990 (50 percent of total meal expenses), uniforms and cleaning of \$2,956, ammunition and range fees of \$1,653, supplies and gear of \$5,810,

¹Total claimed unreimbursed employee business expenses of \$26,498 after subtracting 2 percent of appellants’ reported adjusted gross income (AGI).

- communication expenses of \$2,529, and union dues of \$2,906. Appellants' reported adjusted gross income (AGI) was \$161,774, and 2 percent of AGI is \$3,235.
2. In 2012, appellants were both police officers employed by the City of Modesto. Appellants reported an address in Salinas, California. Appellants each received a monthly uniform allowance of \$94 (\$1,128 per year).
 3. In 2012, when in uniform or driving a "marked vehicle," appellants may take meals at the police department, at any public place subject to limitations, at their own residence, or at the residence of specified relatives, if such locations are within the City of Modesto. Taking meals more than one mile outside of the City of Modesto requires authorization by a Bureau Commander.
 4. On April 12, 2016, FTB issued a Notice of Proposed Action (NPA) proposing to disallow the claimed deductions for unreimbursed employee business expenses, and proposing additional tax of \$2,180, plus applicable interest. The NPA explains that appellants failed to respond to a request to substantiate the claimed deductions.²
 5. In protest, appellants' representative sent an explanation of the reasons appellants believed the expenses were deductible and attached three pages of a Modesto Police Officers Association Memorandum of Understanding (MOU), which is incomplete and undated.
 6. In response, FTB sent appellants a letter requesting a copy of the employer's expense reimbursement policy and detailed schedules to substantiate the amounts and business purpose for the claimed expenses.
 7. Appellants did not respond, and FTB confirmed its NPA. Thereafter, FTB took collection actions, and appellants' 2012 tax liability was paid in full.
 8. Appellants requested a re-audit, which FTB treated as a claim for refund. FTB denied the claim for refund because appellants had not provided the requested substantiation.
 9. This timely appeal followed.

DISCUSSION

Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to that

²That document is not in the record; however, appellants have not disputed that it was sent to them.

deduction. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440.) To sustain that burden, a taxpayer must be able to point to an applicable deduction statute and show that the taxpayer came within its terms. (*Appeal of Briglia* (86-SBE-153) 1986 WL 22833.) Unsupported assertions cannot satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

A taxpayer may deduct unreimbursed employee expenses under Internal Revenue Code (IRC) section 162.³ A deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. (IRC, § 162(a); see *Roberts v. Comm'r*, T.C. Memo. 2012-197.) By contrast, personal, living, or family expenses are generally nondeductible. (IRC, § 262; Treas. Reg. § 1.162-17(a).) The expenses must be both ordinary and necessary business expenditures directly related to the taxpayer's trade or business. (*Deputy v. Du Pont* (1940) 308 U.S. 488, 497; Treas. Reg. § 1.162-1(a).) The performance of services as an employee constitutes a trade or business. (See Treas. Reg. § 1.162-17(a).)

Former IRC section 274(d),⁴ prohibited a deduction for certain expenses unless substantiated by adequate records or by sufficient evidence corroborating the taxpayer's own statement, including any travel expense, including meals away from home or the use of "listed property," as defined in IRC section 280F(d)(4), which includes passenger automobiles. (See *Roberts v. Comm'r*, *supra*.) In these instances, the taxpayer must meet heightened requirements to substantiate the claimed 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 or use of the property; (3) the business purpose of the expense or other item; and (4) the business relationship to the taxpayer of the persons entertained. (Former IRC, § 274(d).) A taxpayer must substantiate each element of an expenditure or use by adequate records or by sufficient evidence corroborating his or her own statement. (Treas. Reg. § 1.274-5T(c)(2)(i) and(c)(3).)

³ Provisions of the IRC referenced in this opinion are incorporated by reference in R&TC section 17201.

⁴ In effect for 2012.

Union Dues

Taxpayers are generally allowed to deduct union dues as unreimbursed employee business expenses. (Treas. Reg. § 1.162-15(c).)⁵ Union dues are deductible so long as the dues are for the purpose of meeting the union’s labor activities and are not used to defray the costs of personal benefits to union members. (*Appeal of Berr* (80-SBE-022) 1980 WL 4950.)

Appellants paid union dues in the amount of \$2,906. FTB alleges that because the amount does not exceed 2 percent of appellants’ AGI, appellants may not deduct these expenses. However, under IRC section 67(b), appellants’ union dues are deductible so long as the aggregate of all allowed miscellaneous deductions exceeds 2 percent of appellants’ AGI.

Vehicle Expenses

As discussed above, appellants are subject to the heightened requirements to substantiate claimed business-related vehicle expenses. “Generally, expenses subject to the strict substantiation requirements of [IRC] section 274(d) must be disallowed in full unless the taxpayer satisfies every element of those requirements.” (*Fleming v. Comm’r*, T.C. Memo. 2010-60, at *2.) Federal regulations provide that taxpayers will have maintained “adequate records” if they keep a contemporaneous log or diary, combined with supporting documents, which substantiate the required elements of the expense, such as the amount, the date, and the business purpose of the item. (Treas. Reg. § 1.274-5T(c)(2)(i).) If “adequate records” are not provided under this provision, the taxpayer must establish each element of the expense by his [or her] own statement containing specific detail as to each element, and “other corroborative evidence sufficient to establish such element.” (Treas. Reg. § 1.274-5T(c)(3).)

Here appellants claimed business-related mileage of \$1,654 based solely on their statement that both used personal vehicles “while off duty to report for court appearances, attending union meetings, etc.” Although appellants reported on their federal return that they have evidence in written form to support the mileage deduction, appellants submitted no contemporaneous log showing the distance traveled, the date of the travel, and the business purpose. Nor did appellants meet the heightened requirements of IRC section 274 by

⁵ Limitations are placed on deduction of dues for purposes such as lobbying, contributing to political campaigns, and attempts to influence legislation. (See Treas. Reg. 1.162-20.)

establishing each element through their own statement along with other corroborative evidence. Therefore, appellants are not entitled to deduct claimed vehicle expenses.

Meals at 50 Percent

The cost of a taxpayer's meals is ordinarily a personal expense which is nondeductible. (IRC, § 262; Treas. Reg. § 1.262-1(b)(5).) However, under certain circumstances taxpayers may deduct 50 percent of the cost of meal expenses paid or incurred while away from home in pursuit of a trade or business. (IRC, §§ 162(a)(2), 274(n).) Adequate records must be maintained for each element of a claimed meal expense "at or near the time of the expenditure or use." (Treas. Reg. § 1.274-5T(c)(2)(ii)(A).) In the alternative, each element of a claimed meal expense deduction may be established by the taxpayer's own written or oral statements that contain "specific information in detail as to such element," and "by other corroborating evidence sufficient to establish such element." (Treas. Reg. § 1.274-5T(c)(3)(i).) Thus, to qualify as a business deduction, appellants' meal expenses must be directly related to the trade or business and adequately substantiated with specific detail.

Appellants claim that what would normally be a nondeductible personal or living expense "takes on the color of a business expense" under their facts and circumstances. (See *Sibla v. Comm'r* (9th Cir. 1980) 611 F.2d 1260, 1262; *Appeal of Moulin* (93-SBE-001) 1993 WL 11729 [firefighters could deduct the cost of a mandatory meal program].) Appellants point to *Christey, et al. v. U.S.* (8th Cir. 1988) 841 F.2d 809 (*Christey*) in support of their claim to deduct on-duty meal expenses. In *Christey* the 8th Circuit court found that "the number of duty-related restrictions and requirements concerning their meals 'effectively extended the performance of the [state] troopers' duties from patrol cars on highways to tables in restaurants.'" (*Christey, supra*, at p. 816, quoting *Coombs v. Comm'r* (9th Cir. 1979) 608 F.2d 1269.) Those restrictions included: 1) that meals be eaten in a public restaurant adjacent to a highway, 2) the restaurant must open to the public and not serve alcohol, 3) meals at home were prohibited during working hours, 4) meals may not be brought from home or eaten in patrol cars, 5) meal times are dictated, 6) troopers were required to respond to emergencies and to information requests from the public. (*Id.* at p. 810.) The court found that the situation was different from taxpayers working through their meal break or where business activities make meals at home inconvenient. (*Id.* at p. 812, distinguishing *Antos v. Comm'r*, 35 T.C. Memo. 1976-89, *aff'd* (9th Cir. 1978) 570 F.2d 350 [taxpayer working late in his office does not qualify for a meal expense deduction]; and *Fife v.*

Comm'r, (1980) 73 T.C. 621 [taxpayer failed to meet the “away from home” test under IRC section 162].)

Appellants submitted a document indicating that while in uniform or in a marked police car, they could eat meals at 1) the police department location, 2) any public place subject to limitations on the number of marked cars or uniformed officers at the same location, or 3) at their own residence or the residence of specified family members so long as such residence was within a mile of the City of Modesto. No other restrictions are indicated in the record. Appellants’ tax return shows an address in Salinas and not in the City of Modesto; however, there is a process to get permission to eat meals at home if they chose to do so. Additionally, they could bring meals from home, and were able to eat meals at the police station or other locations that they personally choose within Modesto. Appellants’ meal restrictions are not significant enough to transform an essentially personal expense into a business expense. (See *Moscini v. Comm'r* (1977) T.C. Memo. 1977-245.) The mere fact that appellants were on-duty and might be interrupted for emergencies does not convert a personal meal expense into a deductible expense.

Uniforms and Cleaning

Expenses of acquiring and cleaning uniforms for law enforcement officials may be deductible. (See *Benson v. Comm'r* (1943) 2 T.C. 12, 15, *affd.* (9th Cir. 1944) 146 F.2d 191 [cost of California Highway Patrol uniform only suitable for wear while on duty and more costly than civilian wear].) However, a trade or business deduction is not allowable to an employee to the extent that the employee is entitled to reimbursement from his employer for an expenditure related to his status as an employee. (*Lucas v. Comm'r* (1982) 79 T.C. 1; *Jetty v. Comm'r*, T.C. Memo. 1982-378.)

Appellants submitted evidence showing that they were required to wear and maintain uniforms, and similarly to the officers in *Benson v. Comm'r*, *supra*, those uniforms are presumably not suitable for civilian wear. Appellants also submitted evidence showing that they were reimbursed for some of those costs by means of receiving a uniform allowance totaling \$2,256 in 2012 (for both appellants). Appellants claim costs in excess of the allowance paid (\$2,956) but have not provided any evidence to substantiate the excess cost for uniforms and cleaning (\$700). Without receipts or other documentation, we have only appellants’ statement, which is insufficient to support a deduction of the excess claimed expenses.

Ammunition and Range Fees/Supplies and Gear

It is reasonable to conclude that appellants, as they alleged, were required as police officers to “be in compliance with weapon training and usage” and to purchase “equipment and supplies.” Such expenses for technical gear, supplies, and training for purposes of maintaining employment would generally be deductible; however, appellants failed to substantiate what items were purchased, on what date, and for what reason. Appellants assert that they were “unable to locate the original receipts” because of the passage of time. They have not provided any other documentation, such as bank account statements or copies of checks, that might substantiate the expenses. Appellants also failed to submit the entire MOU referenced above, and we are therefore unable to ascertain whether the City of Modesto reimburses any of these expenses.

Communication

Appellants assert that their cell phone expenses (\$2,529) should be deductible because they are “required to be available during off duty hours . . . for callback duty.” Appellants have provided no documentation other than their own statements to support the claimed expenses. Appellants have provided no evidence of the breakdown between personal and business use of their cell phones. Appellants have not submitted the entire MOU referenced above to show that they were required to acquire and maintain personal cell phones and were not entitled to reimbursement for that expense.

HOLDING

Appellants have not established that they are entitled to deduct most of their claimed unreimbursed employee business expenses. While they have established that they would otherwise be entitled to deduct union dues of \$2,906, that amount does not exceed 2 percent of their AGI for 2012.

DISPOSITION

FTB’s action is sustained.

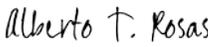
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Teresa A. Stanley
Administrative Law Judge

We concur:

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Administrative Law Judge

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Alberto T. Rosas
Administrative Law Judge

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