OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. ANDRADE AND** **J. ANDRADE**	) OTA Case No. 19014210)))))

OPINION

Representing the Parties:

For Appellants: Sandy Harter, Representative

For Respondent: Brian C. Miller, Tax Counsel III

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

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, C. and J. Andrade (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of $2,797 and applicable interest for the 2013 tax year.

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

ISSUE

Have appellants established that they are entitled to the job expenses and miscellaneous deductions that they claimed as itemized deductions for the 2013 taxable year?

FACTUAL FINDINGS

1. On their 2013 federal income tax return, appellants reported $41,498 as unreimbursed employee expenses, $175 for tax preparation fees, and $3,143 as other miscellaneous expenses. After subtracting 2 percent of their adjusted gross income ($2,253) as required, appellants claimed a total of $42,563 as job expenses and certain miscellaneous deductions on Schedule A (Itemized Deductions) of federal Form 1040. Appellant-husband's claimed unreimbursed employee expenses included $35,185 for vehicle

mileage, parking, and tolls.[1] Appellants also claimed $5,340 for appellant-husband's union dues. The other miscellaneous expenses of $3,143 reportedly consisted of $456 for safety equipment, $2,111 for telephone expenses, $270 for uniforms and cleaning, and $306 for work tools.

2. Appellant-husband was employed as a sheet metal worker by ACCO Engineered Systems, which uses an address in San Leandro, California, as its business address.[2]
3. Appellants resided in Sacramento, California, which is in Northern California. Appellant-husband was employed at two worksites in 2013, one in San Leandro, California, and another in Santa Clara, California. The jobs at these sites each lasted less than a year.
4. FTB examined appellants' income tax return and requested information supporting appellants' claimed deductions.
5. When appellants did not respond, FTB issued a Notice of Proposed Assessment (NPA) that disallowed the entire $42,563 appellants had claimed as job expenses and miscellaneous deductions. The NPA proposed additional tax due of $2,797 plus interest, after applying a standard deduction of $7,812.[3]
6. Appellants protested the NPA but did not provide additional supporting documentation.
7. FTB then issued a Notice of Action which affirmed the NPA. This timely appeal followed.
8. On appeal, appellants provide a calendar with mileage and a document with mileage totals and general locations, proof of appellant-husband's 2013 union dues, a phone bill, and a page from a labor union agreement.
9. After notice to the parties, we took official notice of a publication issued by the U.S. Office of Management and Budget (OMB): OMB Bull. No. 20-01, Revised Delineations

[1] Appellant-wife's claimed vehicle expenses totaled $973, which was also disallowed, but was not specifically addressed by appellants in this appeal.

[2] Appellant-husband also received income of $7,645 from Southland Industries. Neither party has addressed the relevance of this income to appellants' claimed deductions, and we do not discuss it further.

[3] The remaining itemized deductions allowed by FTB totaled $2,271, which was less than the standard deduction for a married couple filing a joint return.

of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas.[4]

DISCUSSION

Income tax deductions are a matter of legislative grace, and the taxpayer bears the burden of proving entitlement to any deduction claimed. (*Appeal of Dandridge*, 2019-OTA-458P.) The taxpayer must identify an applicable statute allowing a deduction and provide credible evidence that their facts are within its terms. (*Ibid*.) The failure to produce evidence within the taxpayer's control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeal of Vardell*, 2020-OTA-190P.)

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, ..."[5] 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).)

Individuals performing services as employees may generally deduct expenses incurred in the performance of such services as itemized deductions. (*Richards v. Commissioner*, T.C. Memo. 2014-88.) To deduct such employee expenses, a taxpayer must not be reimbursed or have the right to reimbursement for such expenses from his or her employer. (*Ibid*.)

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[4] https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf. In an objection letter, FTB did not refute the accuracy of the OMB bulletin, but urged OTA not to apply it to this appeal. Official notice may be taken of any fact which may be judicially noticed by the courts of this State, among other things. (Gov. Code, § 11515.) Judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452(h).) Because FTB's objection did not include any claim of inaccuracy, it is appropriate to take official notice of the OMB bulletin.

[5] IRC sections 162, 262, 274, and 280F are generally incorporated into California law by R&TC section 17201. Recent changes in federal tax law are not relevant to this appeal, which involves the 2013 taxable year, so those changes are not discussed in this decision.

Certain kinds of expenses are not deductible unless the taxpayer provides heightened 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 and cell phones. 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. U.S.* (Ct. Cl. 1973) 473 F.2d 1398, 1401.) The U. S. 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; see Treas. Reg. § 1.274-5(c)(2)(iii).) Although taxpayers may fill in gaps in their records with testimony, there must be other corroborating evidence to meet the requirements of IRC section 274(d). (*Duncan v. Commissioner*, T.C. Memo. 2018-190.)

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). (Treas. Reg. § 1.274-5T(a); *Haskins v. Commissioner*, T.C. Memo. 2019-87, at p. *23.) Further, an expense is not "necessary," as that term is used in IRC section 162, 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.)

Vehicle Expenses

Appellants submitted a summary document entitled "Mileage for 2013" showing monthly miles to two general locations. At the invitation of the Office of Tax Appeals (OTA), appellants also submitted a calendar with notations showing daily mileage for round trips to the same general locations listed on the summary document. It appears to be a contemporaneous log that would meet the substantiation requirements. "As a general rule, expenses for traveling between one's home and one's place of business or employment constitute commuting expenses and,

consequently, are nondeductible personal expenses." (*Bogue v. Commissioner*, T.C. Memo. 2011-164 (*Bogue*).) "[T]he core reason commuting expenses are not deductible is that the taxpayer makes a personal choice about where to live." (*Ibid*., citing *Commissioner v. Flowers* (1946) 326 U.S. 465.) Appellants submitted documentation showing that appellant-husband's mileage for 2013 consisted of driving from their residence to two work locations, one in San Leandro and one in Santa Clara. Appellants assert that appellant-husband is in construction and works "anywhere in northern California."

OTA invited the parties to address whether any of the limited exceptions apply to allow appellants to deduct what would otherwise be personal expenses. The potential exceptions are (1) the home office exception, (2) the temporary distant worksite exception, and (3) the regular work location exception. (*Bogue*, *supra*; Rev. Rul. 99-7, 1999-5 I.R.B. 4.)

The first exception occurs when a taxpayer's residence is the primary place of business; i.e., a home office. (*Bogue*, *supra*; *Curphey v. Commissioner*, 73 T.C. 766, 777-778; Rev. Rul. 99-7, *supra*.) Appellants have not produced evidence that appellant-husband's principal place of business was his residence. To the contrary, appellants' returns do not report any home office expenses. Thus, this exception does not apply.

A second exception may apply to a taxpayer who has no regular work location, but instead travels to a series of temporary worksites outside of the metropolitan area where the taxpayer lives and normally works. (Rev. Rul. 99-7, *supra*; see also *Bogue*, *supra*, citing *Schurer v. Commissioner* (1944) 3 T.C. 544.) "If employment at a work location is realistically expected to last (and does in fact last) for 1 year or less, the employment is *temporary* ....." (Rev. Rul. 99-7, *supra* (original italics).) Because the term "metropolitan area" is ill-defined for this purpose, the U. S. Tax Court concluded that "rather than adopt a rigid test it will consider the facts and circumstances in deciding whether particular travel expenses were incurred in traveling to a worksite unusually distant from the area where the taxpayer lives and normally work. [citations omitted.]" (*Saunders v. Commissioner*, T.C. Memo. 2012-200.) Appellants allege that appellant-husband has no regular work location and is only temporarily assigned to job sites throughout Northern California. Appellant-husband is employed by ACCO Engineered Systems, which lists an address in San Leandro, California, but is not a work location to which appellant-husband travels to perform his sheet metal trade. In 2013, appellant-husband worked at two job

locations, one in San Leandro (east of the San Francisco bay) and one in Santa Clara (south of San Francisco), each for less than a year.

FTB asserts that appellant-husband's regular work location is the greater San Francisco metropolitan area. When a taxpayer's "work takes him [or her] all over a far-flung metropolitan area[,]" they can expect employment anywhere within that general area. (*Harris v. Commissioner*, T.C. Memo. 1980-56 (*Harris*).) In the *Harris* case, the U. S. Tax Court considered whether a taxpayer who resides in Van Nuys, California (in Los Angeles County) and is temporarily assigned to a job locations in Orange County could deduct the mileage to and from the work locations outside the county where he resided. The court concluded that the taxpayer worked within a "far-flung" metropolitan area, and that the "fortuitous location of a county line" does not limit the taxpayer's general work location. (*Ibid*.) *Harris* can be distinguished from this appeal. Los Angeles is indeed a "far-flung" metropolitan area which includes several smaller municipalities. San Francisco, on the other hand, is just one of more than one populous city, each of which is surrounded by several smaller municipalities; for example, San Jose and Oakland.

Moreover, the *Harris* decision predates Revenue Ruling 99-7, *supra*, which provides a limited exception to the general rule that commuting expenses are not deductible when paid or incurred in going between a taxpayer's residence and a temporary worksite outside of the metropolitan area where the taxpayer *resides* and works. The ruling concludes that construction workers who travel out of the metropolitan area in which they reside and normally work may deduct the travel expenses to and from the job sites outside of that metropolitan area. The taxpayer in *Harris* relied on Revenue Ruling 190 (1953-2 C.B. 303), which discussed the difference between expenses incurred for business purposes; i.e., traveling to construction sites, and commuters who fix their residence at a location distant from their regular place of business as a matter of personal convenience. Appellants do not reside in the general metropolitan area where appellant-husband worked in 2013. Appellants allege that appellant-husband accepts work anywhere in Northern California, which suggests that the location of their residence may be near or distant to temporary job sites and so is not located far from the 2013 job sites for their personal convenience. The record does not reflect whether appellant-husband's primary employer, ACCO, employs sheet metal workers throughout Northern California. Thus, we

cannot conclude that appellants' choice to live in Sacramento rather than closer to San Leandro or Santa Clara was for a personal reason.

FTB does not address the temporary nature of appellant-husband's sheet metal trade jobs. The temporary distant worksite exception was created because "'it is not reasonable to expect people to move to a distant location when a job is foreseeably of limited duration.'" (*Dahood v. U.S.* (1st Cir. 1984) 747 F.2d 46, 48, quoting *Kasun v. U.S. (7th Cir. 1982) 671 F.2d 1059, 1061*.) The exception was crafted for situations such as appellants where taxpayers whose work consists of many temporary worksites might not have a choice about the location of those worksites. (See *Bogue*, *supra*.) We find that appellant-husband's work locations in 2013 were temporary as defined by Revenue Ruling 99-7, *supra*. With respect to FTB's contention that appellant-husband's "regular" work location was the San Francisco metropolitan area, we note that Revenue Ruling 99-7, *supra*, uses, but does not define the term "metropolitan." Citing *Wheir v. Commissioner*, T.C. Summ.Op. 2004-117 (*Wheir*), FTB contends the term "metropolitan" means "'relating to, or constituting a region including a city and the densely populated surrounding areas that are socially and economically integrated with it.'" (See *Wheir*, *supra*, quoting Webster's Third New International Dictionary (1986).) In *Wheir*, however, the court rejected the government's overly broad definition of a metropolitan area and confined the area to a 35-mile radius.

Appellants lived in Sacramento, California, which is in Northern California. FTB does not dispute that appellants' residence is distant from appellant-husband's temporary work locations in 2013. As noted above, FTB asserts instead that appellant-husband's regular work location consists of the entire San Francisco metropolitan area and that appellants chose to reside outside of appellant-husband's normal work location. (See *Aldea v. Commissioner*, T.C. Memo. 2000-136 ["Petitioner has not established any business reason for living in Yuba City; her decision to live there was entirely personal"].)

Consistent with the *Wheir* case cited by FTB, we find that FTB has too broadly defined the metropolitan area, even by its definition. As noted above, the term "metropolitan area" is ill-defined, and therefore requires consideration of all "facts and circumstances to decide whether the travel expenses in question were incurred in traveling to a worksite unusually distant from the area where [appellant-husband] lives and normally works." (*Saunders v. Commissioner*, *supra*, T.C. Memo. 2012-200; *Bogue*, T.C. Memo. 2011-164, *supra*, at p. *11.)

How expansive a metropolitan area is may be considered as one of those factors in determining appellant-husband's usual work location. FTB urges us to reject the OMB's determination of metropolitan statistical areas (MSA) because it uses the same standards as does the U.S. Census Bureau, which data was rejected by the U.S. Tax Court in *Wheir*, *supra*. The OMB defines MSAs as those having "at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties." (OMB Bull. No. 20-01, *supra*, at p.*2.) Alameda County (which includes San Leandro) is included in the San Francisco-Oakland-Berkeley MSA. Santa Clara, on the other hand, is located in the San Jose-Sunnyvale-Santa Clara MSA, leading to the inference that there is a higher degree of "social and economic integration" between San Jose and Santa Clara than between San Francisco and Santa Clara. (*Id*., at p.*66.) Under all the facts and circumstances, including the different MSAs in which appellant-husband worked during 2013, we cannot conclude that appellant-husband's regular work location was throughout the entire San Francisco Bay area.

On the other hand, appellants' broad definition of appellant-husband's work location as consisting of temporary job sites throughout Northern California is not supported by the evidence. For 2013, appellant-husband only worked in San Leandro and Santa Clara, California. If appellant-husband's regular work location is all of Northern California, appellants have not established that the two worksites were distant from the place where appellants lived and appellant-husband normally worked. Based on our record, we cannot conclude that the temporary distant worksite exception applies to appellants.

The third exception, the regular worksite exception, does not apply to appellants because we concluded that appellant-husband worked at temporary worksites in 2013 and that having a regular worksite is mutually exclusive of having a temporary worksite. (*See Bogue*, *supra*.)

Moreover, we must also conclude that appellants have not shown they are entitled to claimed deductions for vehicle expenses. In response to OTA's request for additional briefing, appellants provided one page of a document that indicates that some of appellant-husband's travel costs may be reimbursable. The document is labeled page 21 and has no heading, so it is difficult to determine which sheet metal workers qualify for which mileage. The document discusses employers (the parties to the construction contracts) who are signatories to an agreement and those who did not sign the agreement. The document then lays out the

circumstances under which mileage is reimbursable. Appellants did not submit evidence of whether appellant-husband's two temporary worksite employers were signatories to the document. Furthermore, appellants have not shown which miles were reimbursable or that they filed a claim to be reimbursed for mileage. Thus, we cannot determine if any of appellant-husband's mileage was reimbursed or reimbursable. (See *Richards v. Commissioner*, *supra*.) Appellants' claim for mileage deduction must be denied.

Union Dues

In response to OTA's request for additional briefing, appellants did provide proof of appellant-husband's 2013 union dues. FTB concedes that appellants are entitled to that deduction. However, FTB also correctly points out that the total of previously allowed deductions ($2,271) plus the deductible portion of union dues ($3,362)[6] do not exceed appellants' standard deduction ($7,812) for that year. FTB has already proposed applying the standard deduction.

Cell Phone Expenses

At OTA's request, appellants submitted a Verizon statement with a note asserting that one-half of the Verizon expenses was for appellant-wife's phone, and one-half was for appellant-husband's phone. Additionally, the note states that "client states 65 percent was for business use." The statements are insufficient to meet the heightened substantiation requirements of IRC section 274(d). Appellants did not support the prorations used to reach the claimed business expense of $2,111. The monthly statements from Verizon Wireless would presumably have shown which telephone(s) appellant-husband used in his employment and which charges or calls may have been work-related, but those statements were not provided. As previously explained, the failure to produce evidence that is within appellants' control gives rise to a presumption that such evidence, if provided, would be unfavorable to their case. (*Appeal of Vardell*, *supra*.) Furthermore, we have no evidence supporting appellant-husband's eligibility for reimbursement from his employer for cell phone expenses, whether he sought reimbursement, or whether reimbursement was granted or denied. We do not have sufficient evidence to conclude that FTB's determination to disallow the deduction for telephone expenses was incorrect.

[6] Deductible union dues are limited to the excess of 2 percent of appellants' adjusted gross income.

HOLDING

Appellants have not shown that they are entitled to deductions for vehicle expenses or cell phone expenses. Appellants have established that they are entitled to deduct union dues for the 2013 taxable year. Appellants have not established that FTB's use of the standard deduction was in error.

DISPOSITION

FTB's proposed assessment is sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:
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Andrea L.H. Long
Administrative Law Judge

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Tommy Leung
Administrative Law Judge

Date Issued: 2/3/2021