OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of: **M. BEISNER**	) OTA Case Nos. 19054840, 19095237)))))

OPINION

Representing the Parties:

For Appellant: M. Beisner

For Respondent: Brian C. Miller, Tax Counsel III

For Office of Tax Appeals: Oliver Pfost, Tax Counsel

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 19324 and 19045, M. Beisner (appellant) appeals actions by respondent Franchise Tax Board denying appellant's claim for refund of $3,125.23[1] for the 2012 tax year and proposing additional tax of $3,059 plus applicable interest for the 2013 tax year.

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

ISSUES

1. Whether appellant is entitled to deductions for unreimbursed employee expenses for the 2012 and 2013 tax years.
2. Whether appellant is entitled to additional interest abatement.

FACTUAL FINDINGS

1. Appellant is an educational psychologist.
2. Appellant was an employee of the Snowline Joint Unified School District (Snowline) during the 2012 and 2013 tax years.

[1] This amount includes tax of $2,771 and interest of $354.23.

3. Appellant timely filed a 2012 California Resident Income Tax Return, claiming a deduction of $33,703 for unreimbursed employee expenses, including vehicle (mileage), parking and transportation, travel, meals and entertainment, education, and home office expenses on Form 2106 – Employee Business Expenses. Appellant's 2012 tax return also included Schedule C – Profit or Loss from Business (Schedule C). On the Schedule C, appellant reported appellant's principal business or profession as "EDUC PSYCH CONTRACT" and reported zero gross receipts and zero net income from that activity.
4. Appellant filed a timely 2013 California Resident Income Tax Return, claiming a deduction of $33,609 for unreimbursed employee expenses, including vehicle (mileage), parking and transportation, travel, meals and entertainment, education, and home office expenses on Form 2106 – Employee Business Expenses. Appellant did not file a Schedule C for the 2013 tax year.
5. Respondent audited appellant's 2012 and 2013 tax returns and issued appellant Notices of Proposed Assessment (NPAs), disallowing the claimed deductions for unreimbursed employee expenses. Appellant timely protested the NPAs.
6. During the protest for the 2012 tax year, respondent issued appellant an Income Tax Due Notice in the amount of $3,125.23. Appellant paid this amount, thus converting the protest of the NPA for the 2012 tax year into a claim for refund.
7. Respondent denied appellant's claim for refund for the 2012 tax year and issued appellant a Notice of Action for the 2013 tax years, affirming the disallowance of the deductions.
8. Appellant timely filed this appeal.

DISCUSSION

Issue 1: Whether appellant is entitled to deductions for unreimbursed employee expenses for the 2012 and 2013 tax years.

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 deduction. (*Appeal of Vardell*, 2020-OTA-190P.) To sustain the burden of proof, a taxpayer must be able to point to an applicable statute authorizing an income tax deduction and show that the taxpayer came within its terms. (*INDOPCO, Inc., v. Commissioner* (1992) 503 U.S. 79, 84; *Appeal of Briglia* (86-SBE-153) 1986 WL 22833.) By contrast, unsupported assertions cannot

satisfy a taxpayer's burden of proof. (*Appeal of Vardell, supra*; *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Internal Revenue Code (IRC) section 162(a) authorizes a deduction for ordinary and necessary expenses paid or incurred during a tax year in carrying on any trade or business.[2] Generally, performing services as an employee constitutes a trade or business. (Treas. Reg. § 1.162-17(a); *O'Malley v. Commissioner* (1988) 91 T.C. 352, 363-364.) An employee is entitled to deduct unreimbursed ordinary and necessary expenses that are directly connected with or pertaining to his or her employment. (IRC, § 162(a); Treas. Reg. § 1.162-1(a); R&TC, § 17201.) An expense is not "necessary" when an employee has a right to reimbursement for expenditures related to his or her status as an employee, regardless of whether the employee chooses to claim such reimbursement. (*Orvis v. Commissioner* (9th Cir. 1986) 788 F.2d 1406, 1408.)

Appellant asserts the expenses in question were not reimbursable because, as an independent contractor, appellant was not an employee of Snowline and was therefore not subject to reimbursement under Snowline's employee reimbursement policy. However, appellant claimed the deductions as unreimbursed *employee* expenses on the Forms 2106 – Employee Business Expenses, for both tax years in issue.[3] Further, during the protest, appellant provided respondent with letters on Snowline letterhead dated January 23, 2018, and May 15, 2018, both signed by the Assistant Superintendent of Snowline. In each of those letters, the Assistant Superintendent refers to appellant as "former Snowline Joint Unified School District *employee* [M.] Beisner."[4] (Emphasis added.) Finally, Snowline issued appellant Forms

[2] California incorporates IRC section 162 at R&TC section 17201. Additionally, IRC section 67 limits miscellaneous itemized deductions to the aggregate of the deductions exceeding two percent of adjusted gross income. For the tax years at issue, California generally conformed to IRC section 67 at R&TC section 17076.

[3] We also note that appellant did not claim the expenses in question on the Schedule C filed for the 2012 tax year and did not file a Schedule C for the 2013 tax year.

[4] Appellant also provided respondent with a letter on Snowline letterhead dated December 5, 2013, which states that "Mr. Beisner has been receiving yearly contract [sic] for employment; he is contractual and is not eligible to receive reimbursement expenses per SJUSD policy." However, the letter is signed by an unidentified person and without a title under the signature or otherwise indicated on the letter. The early date of the letter – i.e., December 5, 2013, which is more than one year before respondent's audit commenced in 2015 – raises questions around the purpose and timing of this letter. Thus, we find this letter to be of questionable relevance in determining whether appellant may have been an independent contractor, rather than an employee, of Snowline or whether as a "contract" employee appellant was (or was not) entitled to reimbursement pursuant to Snowline's employee reimbursement policy.

W-2 for both tax years in issue as an employee of Snowline.[5] In light of this evidence, we find that, for purposes of determining whether appellant is entitled to deductions for unreimbursed employee expenses for the 2012 and 2013 tax years, appellant was an employee of Snowline.

To the extent appellant is arguing that appellant was a "contract" employee, rather than an independent contractor, and that as a "contract" employee, appellant also was not covered by Snowline's employee reimbursement policy, we note that appellant has failed to substantiate these contentions. There is nothing in the policy to indicate that it was only applicable to certain classes or types of employees. Further, appellant has not provided any evidence (such as annual employment contracts with Snowline for the 2012 and 2013 years) to indicate that appellant was contractually responsible for the expenses incurred in connection with appellant's employment and was precluded from seeking reimbursement from Snowline for these expenses.

Instead, during the tax years in issue, the record shows that Snowline had a written policy for reimbursing employees for expenses incurred in carrying out Snowline business.[6] Moreover, in both of the aforementioned letters dated January 23, 2018, and May 15, 2018, the Assistant Superintendent states that Snowline allows employees to apply for reimbursement for employment-related expenses, and that appellant "may have chosen to take the allowable state and federal itemized tax deductions for business expenses while employed with Snowline." However, a taxpayer cannot choose between claiming reimbursement from an employer and claiming a tax deduction – i.e., an employee must seek reimbursement, and if reimbursement is rejected, only then is the expense an allowable deduction as an unreimbursed employee expense. (*Orvis v. Commissioner*, *supra*.) There is no evidence that appellant sought reimbursement from Snowline for the employment related expenses appellant incurred in 2012 and 2013, nor that

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[5] While requested by respondent at protest, appellant did not provide an employment contract or any other contractual evidence of an independent contractor relationship with Snowline. There is also no evidence in the record that Snowline issued appellant a Form(s) 1099 (as an independent contractor).

[6] The record in this matter includes Snowline's policies and procedures (the policy), which states that "[t]he Board shall authorize payment for actual and necessary travel expenses incurred by any employee performing authorized services for the district, whether within or outside district boundaries (Education Code 44032)." The policy also states that "[r]eimbursable travel expenses may include, but are not limited to, costs of transportation, parking fees, bridge or road tolls, lodging when district business reasonably requires an overnight stay, registration fees for seminars and conferences, telephone and other communication expenses incurred on district business, and other necessary incidental expenses." The record also includes evidence of a telephone conversation between respondent and Snowline's assistant superintendent wherein the assistant superintendent stated that employees have the right to be reimbursed by Snowline.

such reimbursement was rejected by Snowline. Appellant is therefore not entitled to the claimed deductions for unreimbursed employee expenses for the 2012 and 2013 tax years.

We also note that appellant's unreimbursed employee expenses include deductions for a home office, which is not explicitly listed as reimbursable under Snowline's employee reimbursement policy. While IRC section 280A(c) does permit a deduction for home office expenses if a portion of the home is "exclusively used on a regular basis" as the taxpayer's principal place of business, in the case of an employee, this deduction is only authorized if the home office is maintained for the convenience of the employer.[7] Appellant has not provided evidence that Snowline required appellant to use a home office for Snowline's convenience and, in fact, appellant concedes that it did not. Thus, appellant's home office expenses are not deductible as an unreimbursed employee expense. (See IRC, § 280A(c).)

Issue 2: Whether appellant is entitled to additional interest abatement.

Interest is required to be assessed from the date when payment of tax is due through the date that it is paid. (R&TC, § 19101.) The assessment of interest on a tax deficiency is mandatory and there is no reasonable cause exception to the imposition of interest. (R&TC, § 19101; *Appeal of Gorin*, 2020-OTA-018P.) OTA's jurisdiction over interest abatement is limited to reviewing respondent's determination for abuse of discretion. (R&TC, § 19104(b)(2)(B); *Appeal of Gorin*, *supra*.) To show abuse of discretion, a taxpayer must establish that, in refusing to abate interest, respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Gorin*, *supra*.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, and abatement should be ordered only "where failure to abate interest would be widely perceived as grossly unfair." (*Ibid*., citing *Lee v. Commissioner* (1999) 113 T.C. 145, 149.)

Appellant does not argue abuse of discretion. Rather, appellant argues that respondent should abate all accrued interest because appellant's tax accountant provided unclear advice due to a medical condition.[8] However, this is a reasonable cause type of argument and there is no

[7] California incorporations IRC section 280A at R&TC section 17201.

[8] Appellant also requests abatement of "all penalties." However, we do not address this request because respondent did not impose any penalties for either tax year at issue.

reasonable cause exception to the imposition of interest. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Thus, appellant is not entitled to additional interest abatement.[9]

HOLDINGS

1. Appellant is not entitled to deductions for unreimbursed employee expenses for the 2012 and 2013 tax years.
2. Appellant is not entitled to additional interest abatement beyond that permitted by respondent.

DISPOSITION

As conceded by respondent, interest imposed on the 2012 deficiency from November 10, 2015, through April 15, 2016, is abated. Otherwise, respondent's action is sustained.

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Elliott Scott Ewing
Administrative Law Judge

We concur:

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Administrative Law Judge

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Richard I. Tay
Administrative Law Judge

Date Issued: 4/7/2021

[9] Respondent agreed to abate interest that accrued on the 2012 deficiency from November 10, 2015, through April 15, 2016, because there was a delay during respondent's audit of appellant's 2012 tax return.