BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DON E. AND M. L. SMITH)

For Appellants: Don E. Smith,
in pro. per.

For Respondent: Kendall E. Kinyon
Counsel,

O P I N I O N

This appeal is made pursuant to section **18593** of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Don E. and M. L. Smith against proposed assessments of additional personal income tax in the amounts of $428.39 and $546.98 for the years 1975 and 1976, respectively.

The issues presented by this appeal are whether appellants are entitled to deductions in amounts greater than those allowed by respondent for travel expenses, education expenses and child care expenses.

Appellants are residents of California and filed joint income tax returns for the years 1975 and 1976. Respondent examined these returns and disallowed certain deductions. The only deductions remaining in dispute are those for Mr. Smith's educational and business travel expenses, Mrs. Smith's educational expenses, and appellants' child care expenses. Respondent's denial of appellants' protest against the proposed assessment of additional tax led to the filing of appeals for 1975 and 1976.

The first issue concerns the disallowance of deductions for educational expenses incurred by Mr. Smith during the first half of 1975. Upon his college graduation in 1966, Mr. Smith accepted a position as a social worker with Sonoma County... By 1970, he had risen to the position of Social Service Worker III and was assigned to the Child Placement. Division. In 1973, Mr. Smith took a leave of absence from his employment and enrolled in a. Masters in Social Work ("MSW") program at Fresno State University. Because of the distance involved, Mr. Smith left his family in Laytonville, where the family resided, and traveled to Fresno for classroom instruction and to other parts of California for required field training. On their 1975 return, appellants deducted Mr. Smith's travel, food and lodging expenses incurred in connection with the MSW program as educational expenses. Mr. Smith obtained his MSW in June 1975, at which time he became a Social Service Practitioner with the Child Placement Division of Sonoma County. The minimum educational requirement for this position in 1975 was an MSW.

Respondent determined that Mr. Smith's primary purpose in obtaining an MSW was to obtain a new position or a substantial advancement in position, and therefore, the costs incurred for travel, food and lodging claimed as educational expenses were not deductible.

Revenue and Taxation Code section 17202 allows an individual to deduct all "ordinary and necessary" business expenses. (Rev. & Tax. Code, § 17202, subd. (a).) During the years at issue, educational expenses were deductible as business expenses if the education was undertaken primarily either to maintain or improve

skills needed by the taxpayer in his employment or business, or to meet the employer's requirements, applicable law or regulations imposed as a condition for the taxpayer's retention of his employment, status, or salary. (Cal. Admin. Code, tit. 18, reg. 17202(e) (Repealer filed Feb. 17, 1979, Register 79, No. 7-B).) Educational expenses were not deductible if the taxpayer undertook the education primarily to obtain a new position or a substantial advancement in position. (Former Cal. Admin. Code, tit. 18, reg. 17202(e).) The regulation in effect during the year at issue also provided that, unless the education undertaken by the taxpayer was required as a condition to retention of his employment, the fact that the education qualified him for a new position or advancement would be an important factor indicating that the education was undertaken primarily for the purpose of obtaining a new position or advancement. (Former Cal. Admin. Coae, tit. 18, reg. 17202(e), subd. (2).)

Based on the evidence before us, we conclude that the MSW obtained by Mr. Smith qualified him for a substantial advancement in position. Appellants have provided us with copies of Sonoma County's job descriptions for the positions of Social Service Worker III and Social Service Practitioner. These reveal that the Social Service Worker III position is the highest position in a series of social worker positions requiring only a college degree, and that the Practitioner position is the first level of professionally trained social worker positions requiring an MSW. Although the duties of the two positions are somewhat similar, the Practitioner's duties appear to be substantially more complex than those of a Social Service Worker III. In addition, the Practitioner's duties include acting as a consultant to social workers without professional training, presumably including Social Service Workers III. Based on the foregoing, we agree with respondent that Mr. Smith's MSW qualified him for a substantial advancement in position.

Appellants contend that Mr. Smith did undertake the education primarily to retain his position as a social worker in the Child Placement Division. They claim that after Mr. Smith was assigned to the Child Placement Division, his employer decided that all positions in that division should be filled by Social Service Practitioners. In support of their position, appellants submitted a letter from the Director of the Sonoma County Social Service Department. However,

rather than indicating that the MSW was required in order for appellant to retain his employment, this letter seems to indicate that prior to his return to school, Mr. Smith was assigned to a position normally held by a Practitioner. Thus, his return to school to obtain his MSW would merely allow, him to meet the minimum qualifications of this position for the first time. Such educational expenses are personal in nature and non-deductible. (Former Cal. Admin. Code, tit. 18, reg. 17202(e), subd. (2).)

Appellants emphasize that both before and after obtaining his MSW, Mr. Smith was assigned to the Child Placement Division. This fact alone is not sufficient to make the educational expenses deductible. There is no evidence indicating that had Mr. Smith failed to obtain an MSW, he would have been unable to retain his position as a Social Service Worker III with Sonoma County, albeit in a different division. The MSW obtained by Mr. Smith not only enabled Mr. Smith to remain in the Child Placement Division, it enabled him to qualify for a position which required more formal training, and gave him more responsibility than his former position. These facts indicate that Mr. Smith returned to school not to retain his position as a Social Service Worker III, but rather to meet the minimum qualifications of the Social Service Practitioner position and thus to obtain a substantial advancement in position.

Since appellants have failed to prove Mr. Smith needed the MSW to retain his position as a Social Service Worker III, we conclude that his primary purpose in returning to school was to obtain an advancement in position. Therefore, the expenses associated with this education are not deductible business expenses.

Appellants also claimed a deduction for away from home travel expenses incurred by Mr. Smith between June 1975 and December 1976. For the period between June 1975 and September 1976, Mr. Smith worked for Sonoma County in Santa Rosa. The distance of approximately 112 miles between Santa Rosa and Laytonville, where his family lived, precluded Mr. Smith from commuting daily between the two cities. His family did not move to Santa Rosa because Mrs. Smith was employed in Laytonville. Therefore, Mr. Smith spent Saturday through Monday with his family, and stayed in Santa Rosa Tuesday through Friday while he worked four ten-hour

days. Appellants claimed a deduction for travel and living expenses incurred by Mr. Smith while working in Santa Rosa. In September 1976, appellant accepted employment with the State of California. For the remainder of 1976, he worked out of his home in Laytonville, but was required to attend occasional staff meetings in Santa Rosa. Appellants deducted the expenses incurred in connection with these staff meetings which were not reimbursed by his employer. Respondent disallowed the deductions for all Mr. Smith's travel expenses on the ground that these expenses were incurred for appellants' personal convenience rather than because of business necessity.

Traveling expenses can be deducted only if they are reasonable and necessary, incurred while away from home, and incurred in the pursuit of a trade or business. (Rev. & Tax. Code, § 17202, subd. (2); Appeal of Paul H. and Elizabeth M. Kahelin, Cal. St. Bd. of Equal., Aug. 16, 1979.) When a taxpayer chooses not to move to his place of employment in order to enable his spouse to retain her employment, the choice is a personal one and the expenses of the second residence are not deductible business expenses. (Hantzis v. Commission, 638 F.2d 248 (1st Cir.), cert. den., -- U.S. -- [69 L.Ed.2d 973] (1981). Appeal of Carroll R. Page, Cal. St. Bd. of Equal., May 9, 1979.) Since Mr. Smith's only reason for not moving to Santa Rosa during the period from June 1975 to September 1976 was to enable Mrs. Smith to retain her employment, the travel expenses incurred during this period are not deductible.

The portion of the away-from-home travel expenses incurred in late 1976 in connection with Mr. Smith's attendance at staff meetings in Santa Rosa while employed in Laytonville, however, are deductible. Apparently, respondent determined that these expenses were reasonable and were adequately substantiated since it did not raise these issues. A taxpayer's home for tax purposes, generally, is his place of employment. (Appeal of Stuart D. and Kathleen Whetstone, Cal. St. Bd. of Equal., Jan. 7, 1975), At the time these expenses were incurred, appellant was employed in Laytonville and was required to remain overnight in Santa Rosa; therefore, expenses incurred in traveling to Santa Rosa were incurred while away from home. Since the travel was directly connected to Mr. Smith's employment and was required by his employer, the expenses were incurred in the pursuit of a trade or business. The

three requirements of deductibility were met; therefore, a deduction for these expenses should have been allowed.

The next issue concerns respondent's disallowance of a portion of Mrs. Smith's educational expenses. During the summer of 1976, both Mr. and Mrs. Smith took a travel study tour of western Europe, sponsored by Sonoma State College. Mrs. Smith, who was employed as a social studies teacher at the time, received college credits for the study tour. These credits helped her meet her employer's continuing education requirement. Appellants deducted one-half of the entire cost of the European tour as representing Mrs. Smith's portion of the expenses. Respondent disallowed one-half of the claimed deduction on the ground that, to that extent, the trip was a personal expense.

If the expenses of obtaining an education are deductible, and the taxpayer travels with the primary purpose to obtain that education, he can deduct his travel, food and lodging expenses. However, if the taxpayer also engages in personal activity during his travels, the portion of the expenses attributable to that personal activity is not deductible. (Former Cal. Admin. Code, tit. 18, reg. § 17202(e)(4).) For the year in issue, subdivision (3) of regulation 17202(e) provided that, generally, expenses for travel as a form of education are not deductible business expenses. Despite that regulation, respondent determined that one-half of the cost of Mrs. Smith's trip was deductible. It determined that the other half of Mrs. Smith's expenses were personal in that she and her husband visited cities normally visited by tourists and participated in normal tourist activities.

The burden is on appellants to prove that respondent erred in allowing only one-half of the claimed deduction. (Appeal of Bernice V. Grosso, Cal. St. Bd. of Equal., Aug. 1, 1980.) In a case similar to this appeal, this board held a teacher did not prove travel expenses to be deductible despite the fact that the school district approved of the trip and gave her salary credits. (Appeal of Bernice V. Grosso, supra.) Appellants produced a letter from the principal of Laytonville High School, where Mrs. Smith was employed, but this letter alone does not meet their burden of proof. The letter indicates that the trip to Europe helped Mrs. Smith perform her duties; it does not prove that Mrs. Smith spent either none or less than one-half

of her time during the trip pursuing normal tourist activities. Since appellants have failed to produce such evidence, respondent's action with regard to this deduction must be sustained.

The final issue concerns respondent's disallowance of appellants' claimed deduction for child care expenses for 1976. Until its repeal in 1977, section 17262 of the Revenue and Taxation Code allowed a deduction for certain employment-related expenses incurred for the care of certain dependents. If the taxpayer's adjusted gross income exceeded $12,000, the amount allowed as a deduction was reduced by fifty cents for each one dollar of income over $12,000. (Rev. & Tax. Code, § 17262, subd. (d) (repealed by Stats. 1977, ch. 1079).) Appellants claimed child care expenses in 1976 of $1,053. Since their adjusted gross income for that year exceeded $12,000 by more than $2,106, twice the amount of the claimed deduction, they are not entitled to any child care deduction for 1976.

In conclusion, respondent erred in disallowing a travel expense deduction for expenses incurred by Mr. Smith during 1976 in connection with his attendance of meetings in Santa Rosa. Respondent must modify its proposed assessment to allow a deduction for these expenses. With regard to the remaining deductions for travel expense, education expense and child care expense, appellant has not proven that respondent erred in disallowing these deductions. Therefore, the action of respondent, as modified, must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Don E. and M. L. Smith against a proposed assessment of additional personal income tax in the amounts of $428.39 and $546.98 for the years 1975 and 1976 respectively, be modified to reflect the allowance of one deduction for 1976 as provided in the foregoing opinion. In all other respects, the action of the Franchise Tax Board is hereby sustained.

Done at Sacramento, California, this 26th day of July , 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett , Chairman

Ernest J. Dronenburg, Jr. , Member

Richard Nevins , Member

, Member

, Member