BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
PAUL H. AND ELIZABETH M. KAHELIN)

Appearances:

For Appellants: Paul H. Kahelin, in pro. per.

For Respondent: Carl G. Knopke 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 Paul H. and Elizabeth M. Kahelin against a proposed assessment of additional personal income tax in the amount of $205.48 for the year 1977.

This appeal addresses the following issues:

(1) Whether appellants' travel and living expenses were properly disallowed;

(2) Whether respondent's partial disallowance of appellants' claimed job hunting expense was correct:

(3) Whether respondent's proposed assessment was timely; and

(4) Whether there were two audits of appellants, and, if there were, whether two audits for the same tax year are excessive and violative of California laws.

For convenience, Paul H. Kahelin will hereafter be referred to as "appellant."

Appellant is a fluid systems design engineer who specializes in the design of hydraulic and pneumatic systems for military and commercial vehicles. Appellant and his family have maintained a residence in El Cajon, California, since 1956. Sometime prior to 1974, appellant, unable to find employment in the El Cajon area, accepted employment in the Los Angeles area. He first worked for Lockheed Aircraft Corporation and then for Rockwell International Corporation, where he remained employed until late August of 1977, which is the year on appeal. During this employment period appellant maintained a residence in the Los Angeles area. His family remained in El Cajon where his wife was employed, and appellant returned to El Cajon on the weekends.

In August of 1977 appellant's employment with Rockwell International Corporation terminated. He remained unemployed until January 23, 1978. During his months of unemployment appellant sought employment in the Los Angeles and the San Diego areas.

In April of 1978 appellants filed a timely joint 1977 California personal income tax return. On the return appellants claimed a $2,021.38 travel and living expense deduction as a gross income adjustment and itemized deductions of $8,401.77. Of this latter amount $854.53 was claimed as a job hunting expense.

Respondent audited appellants' return, and in April of 1980 respondent requested that appellant provide

substantiation for the travel and living expenses and the job hunting expenses claimed on the 1977 return. Appellant provided evidence to substantiate $401.53 in job hunting expenses. Respondent was not satisfied with the evidence submitted in support of the remaining $453 in job hunting expenses and disallowed the deduction to that extent. After reviewing appellant's explanation of the travel and living expenses claimed, respondent determined on legal grounds that appellant was not entitled to any Of these expenses. On July 17, 1980, respondent issued a notice of proposed assessment which reflected this determination.

Appellant has several major disagreements with this proposed assessment. First, appellant contends that his travel and living expenses were improperly disallowed. Second, appellant believes that he is entitled to the job hunting expenses claimed. Third, appellant contends that respondent's proposed assessment was not timely. Finally, appellant contends that two audits for the same year are excessive and violative of California law.

Appellant's first major argument is that his travel and living expense deductions totaling $2,021.38 were improperly disallowed. Revenue and Taxation Code section 17202, subdivision (a), provides that:

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--
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> * * *
>
> (2) Traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; ...

Section 17282 of the Revenue and Taxation Code provides, however, that "[e]xcept as otherwise expressly provided in this part, no deduction shall be allowed for personal, living, or family expenses." In the Appeal of Paul H. and Elizabeth M. Kahelin, decided by this board on August 16, 1979, we found that expenditures motivated by the personal convenience of the taxpayer and not required by the exigencies of business do not qualify for the traveling expense deduction. We held that in order to qualify, the traveling expenses must be: (1) reasonable and

necessary; (2) incurred while the taxpayer is "away from home"; and (3) directly connected with carrying on the business of the taxpayer or his employer. When a taxpayer with an established residence in one locality accepts employment in another and takes quarters near his job while continuing to maintain the permanent residence for his family, it becomes necessary to determine if it is reasonable to expect the taxpayer to move the permanent residence to the vicinity of his employment. We found that although Mr. Kahelin's job, due to the instability in the aerospace industry, may have been indefinite, there was nothing to indicate that Mr. Kahelin was hired by Rockwell on a temporary basis. We concluded, therefore, that because Mr. Kahelin's employment was not temporary, it was reasonable to expect him to move his permanent residence to the Los Angeles area. His travel expenses were found to be motivated by personal considerations and the deductions were not allowed.

The facts in the prior appeal are identical to the facts in the current appeal and the law has not changed. The expenses, in order to be deductible, must be required by the employer. The job, not the taxpayer's pattern of living, must require the travel. (Commissioner v. Peurifoy, 254 F.2d 483 (4th Cir. 1957), affd. per curiam, 358 U.S. 59 [3 L.Ed.2d 30] (1958); Commissioner v. Flowers, 326 U.S. 465 [90 L.Ed. 203] (1946).) The fact that Mrs. Kahelin stayed in El Cajon to keep her job does not affect our decision. (See Harold V. Lamberson, ¶ 70,131 P-H Memo. T.C. (1970); Robert A. Coerver, 36 T.C. 252 (1961); Virginia Foote, 67 T.C. 1 (1976).)

The second issue presented in this case is whether certain job hunting expenses should be allowed. Appellant claimed job hunting expenses which totalled $854.53. Respondent allowed the $401.53 claimed for meals and lodging, resume printing, stamps and telephone calls. Nothing was allowed for the $453 amount claimed for car mileage. At respondent's request, appellant submitted a history of the mileage figures. He indicated that he looked for a job from August 19, 1977, until December 31, 1977. Appellant contends that because his home is in El Cajon, it is a 40 mile round trip to job hunt in the San Diego area and a 310 mile round trip to job hunt in the Los Angeles area. Respondent concluded that this written history submitted by appellant was not sufficient documentation, as the history was not a diary of the job hunting travels but merely a recording based upon appellant's memory of events.

Section 162, subdivision (a)(2), of the Internal Revenue Code, which is substantially the same as section 17202, subdivision (a)(2), of the Revenue and Taxation Code, has been held to allow deductions for amounts paid by an employee in seeking new employment. (Rev. Rul. 75-120, 1975-1 Cum. Bull. 55; Rev. Rul. 77-16, 1977-1 Cum. Bull. 37.) It is well established that the taxpayer who claims a deduction has the burden of proving that he is entitled to such deduction. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 1348] (1934).) Appellant, at respondent's request, submitted a detailed report of his mileage. Although this accounting was prepared after the fact, the report contains a breakdown of departure points, mileage, dates, destinations, purposes of the trips, and persons contacted for job applications or interviews. We conclude that this evidence, in coordination with the evidence of job hunting expenses already found acceptable by respondent, is sufficient to support a mileage expense deduction based on the 2,434 miles documented by appellant.

The third issue is whether the deficiency assessment by respondent was timely. Revenue and Taxation Code section 18586, subdivision (a), provides that a notice of proposed deficiency assessment must be mailed to the taxpayer within four years after the return was filed. Appellants filed a timely joint 1977 California personal income tax return in April of 1978. On July 17, 1980, respondent issued the notice of proposed assessment. It is clear, therefore, that the notice of assessment was mailed well within the four-year period.

The last major issue is whether there were two audits of appellants for the same tax year, and, if there were, whether the audits were excessive. The facts available indicate that appellants were given a $220 refund in May of 1978 based on the information contained in appellants' 1977 return. Subsequent to this refund appellants were audited. As a result of this audit, respondent issued a notice of deficiency. There is no evidence that appellants were audited twice or that any actions taken by respondent were excessive. We note that even if appellants had been audited twice for the same year, this action is not improper. (Appeal of Louis and Ettie Hozz, Cal. St. Bd. of Equal., March 30, 1944.)

In addition to the major contentions discussed above, appellant contends that section 19111 of the Revenue and Taxation Code requires that respondent must recover any refund made from the originally filed return

through a court action. We do not agree. Section 19111 merely provides an alternative method for recovering a refund made in error. The statute does not preclude the issuance of a deficiency determination. The court in Warner v. Commissioner, 526 F.2d 1 (9th Cir. 1975), considered the issue of whether the Commissioner of Internal Revenue had a choice of recouping an erroneous payment to a taxpayer either by way of a refund suit or by way of statutory deficiency procedures. The taxpayers in this case were improperly given a refund for 1969. In 1971 the taxpayers' 1969 return wag audited and a.deficiency was assessed. The Warner court held that the commissioner could either recoup the erroneous refund by a refund suit or by issuing a deficiency determination.

Finally, there is no merit to appellant's argument that respondent's initial review of his return upon its filing estops respondent from making any adjustments through a proposed deficiency. Not only is this initial review not a deficiency determination but, even if it were, it is well established that more than one deficiency tax assessment may be issued for the same taxable year. (Rev. & Tax. Code, § 18583; Appeal of James T. and Janice Sennett, Cal. St. Bd. of Equal., Sept. 28, 1977.)

For the reasons stated above, we will sustain respondent's action except as to the issue of mileage claimed.

Appeal of Paul H. and Elizabeth M. Kahelin

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 Paul H. and Elizabeth M. Kahelin against a proposed assessment of additional personal income tax in the amount of $205.48 for the year 1977, be and the same is hereby modified to allow the job-hunting expense deduction for the mileage specified in this opinion. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 28th day of February, 1984, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9