BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )
)
RICHARD BYRD )

For Appellant: Richard Byrd,
in pro. per.

For Respondent: Charlotte A. Meisel
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 Richard Byrd against a proposed assessment of additional personal income tax in the amount of $326 for the year 1975.

The two issues presented in this appeal are (1) whether appellant qualifies for head of household status, and (2) whether appellant is entitled to deduct his theology school expenses as "ordinary and necessary" business expenses.

Appellant, a high school teacher, filed a timely personal income tax return for 1975. On this return appellant claimed head of household status, naming his daughter Lisa as his qualifying dependent. He also claimed a deduction for education expenses.,

Respondent, subsequent to appellant filing his return, received a copy of a federal audit report for the same taxable year which included a finding that appellant's daughter, Lisa, was not living in appellant's home during the period in issue. Given this finding of fact, respondent concluded that appellant was not eligible for head of household status because Lisa, his claimed qualifying dependent, had been kidnapped by her mother and did not live with appellant at any time during the taxable year.

The federal report further indicated that the claimed education expense deduction of $942.15 was disallowed on the basis that the master of divinity degree appellant obtained from Talbot Theological Seminary qualified appellant for a new trade or business. Respondent issued a proposed assessment but deferred action on appellant's protest until it was notified by the Internal Revenue Service of a final determination adverse to appellant. Respondent then affirmed the assessment, and appellant filed this appeal contesting only that portion of the assessment which disallows the head of household status and the claimed education expense deduction.

As to the head of household issue, appellant contends that he maintained a place of abode for his daughter and held it open for her even though she never lived there during the year in question. He further asserts that he had legal custody of his daughter and that because he never abandoned her, he should be able to claim her on his tax return. As to the issue involving the education expenses, appellant contends that he took courses from a recognized university and that these courses were taken to improve his teaching skills rather than to qualify him for a new profession.

Initially, we note that the findings of the Franchise Tax Board in assesing taxes are prima facie

correct. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414) (1949).) Appellant, therefore, has the burden of producing sufficient evidence to overcome the resulting presumption of correctness . (Appeal of Joseph J. and Julia A. Battle, Cal. St. Bd. of Equal., April 5, 1971.) This presumption is not overcome by unsupported statements of the taxpayer. (Appeal of Robert C. , Deceased, and Irene Sherwood, Cal. St. Bd. of Equal., Nov. 30, 1965.)

Revenue and Taxation Code section 17042, which is substantially similar to section 2(b) (1) of the Internal Revenue Code, provides, in pertinent part, that an individual is entitled to head of household status if he is unmarried and maintains as his home a household which constitutes for that taxable year the principal place of abode of a daughter. The statutory requirements are clarified in section 1.2-2(c) (1) of the Treasury regulations, which is virtually identical to respondent's former regulation 17042-17043, subdivision (b) (1) (Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (b)(1), repealer and new section filed July 17, 1975 (Register 75, No. 29). Treasury regulation section 1.2-2 (c)(l) provides, in part:

> In order for a taxpayer..to be considered as maintaining a household by reason of any individual described in paragraph (a) (1) or (b) (3) of this section, the household must actually constitute the home of the taxpayer for his taxable year. ... Such home must 'also constitute the principal place of abode of at least one of the persons specified'in such paragraph (a)(l) or (b)(3). ... The taxpayer and such other person must occupy the household for the entire taxable year of the taxpayer. ... The taxpayer and such other person will be considered as occupying the household for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than 6 months in the taxable year of the taxpayer, shall be considered temporary absence due to special circumstances. Such absence will not prevent the taxpayer from being considered as maintaining a household if (i) it is reasonable to assume that the taxpayer or

such other person will return to the household, and (ii) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return.

The regulation cited above provides that head of household status may be maintained if the specified person is temporarily absent from the household and if it is reasonable to assume that the specified person will return to the home. In this case, we must conclude that appellant has not met his burden of proof and has not shown that it was reasonable to assume that his daughter would return to his home.

The courts, in determining whether it is reasonable to assume that a specified person will return to a household, have held that, "'... the true test is not whether the return may be prevented by an act of God, but rather whether there are indications that a new permanent habitation has been chosen ....'" (Brehmer v. United States, 191 F.Supp. 421, 424 (D. Minn. 1961).)

Appellant's daughter had lived with her mother since 1973. There is no evidence that the police were searching for appellant's daughter or that it was reasonable to expect the daughter to return to appellant's home even if she was able. In other words, there is no evidence that appellant's daughter wanted to return to appellant's home or that appellant actively tried to secure her return. When there is no reasonable expectation that appellant's daughter will return to his abode, appellant's residence cannot be considered the daughter's principal place of abode. (See Richard Michael Manning, 72 T.C. 838 (1979).)

The second issue presented in this appeal is whether education expenses involved in obtaining a master of divinity degree are deductible on appellant's return. Revenue and Taxation Code section 18451 provides that if a final determination by the Commissioner of Internal Revenue changes the reported amount of a taxpayer's gross income or deductions, the taxpayer shall either concede the accuracy of the determination or state why it is erroneous. It is well established that a determination by respondent based upon a federal audit is presumed to be correct and that the burden is on the taxpayer to overcome this presumption. (Appeal of James A. McAfee, Cal. St. Bd. of Equal., Feb. 3, 1977; Appeal of Helen G. Gessele, Cal. St. Bd. of Equal., April 8, 1980.) It is

thus the responsibility of appellant to present evidence that will overcome the presumption, that the educational expenses were properly disallowed.

The cost of education is generally a nondeductible personal expense; however, some educational expenses may be deductible if they qualify under Revenue and Taxation Code section 17202: Initially, we note that Revenue and Taxation Code section 17202 is almost identical to section 162 of the Internal Revenue Code. It is well established that federal precedents are entitled to great weight when construing state law that is based upon or comparable to federal law. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 451 (1942).) Subdivision (a) of section 17202 allows as a deduction all ordinary and necessary business expense's paid or incurred during the taxable year in carrying on any trade or business. This section has been construed to include a taxpayer's education expenses if such expenses are primarily for the purpose of:

> (A) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or'
>
> (B) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment.

(Former Cal. Admin. Code, tit. 18, reg. 17202, subd. (e), repealer filed Feb. 24, 1979 (Register 79, No. 7).)

The'regulation further provided that:

> Expenditures made by a taxpayer for his education are not deductible if they are for education undertaken primarily for the purpose of obtaining a new position or substantial advancement in position, or primarily for the purpose of fulfilling the general educational aspirations or other personal purposes of the taxpayer. The fact that the education undertaken meets express requirements for the new position or substantial advancement in position will be an important factor indicating that the education is undertaken primarily for the purpose of obtaining such position or advancement, unless such education is required as a

> condition to the retention by the taxpayer of his present employment. In any event, if education is required of the taxpayer in order to meet the minimum requirements for qualification *or* establishment in his intended trade or business or speciality therein, the expense of such education is personal in nature and therefore is not deductible.

(Former Cal. Admin. Code, tit. 18, reg. 17202, subd. (e), repealer filed Feb. 21, 1979 (Register 79, No. 7).)

Thus, to be eligible to deduct his educational expenses, appellant must show either that he undertook the education primarily to improve skills, required by his business or that the education was required by his employer. Appellant must also show that the expenses were ordinary and necessary and that they were not undertaken primarily for the purpose of obtaining a new position or for other personal purposes.

Under the above-quoted regulation, it is the primary purpose at the time the courses are actually taken which governs. (Welsh v. United States, 210 F.Supp. 597 (N.D. Ohio, E.D. 1962), affd., 329 F.2d 145 (6th Cir. 1964).) Therefore, it is the taxpayer's motives for undertaking educational courses which are relevant. A taxpayer is entitled to deduct such expenses even if the courses qualify him for a new trade or business, if the taxpayer's primary purpose at the time the education was undertaken was to improve his skills in carrying on his pre-existing vocation. (Greenberg v. Commissioner, 367 F.2d 663 (1st Cir. 1966).) Appellant, however, has the burden of proving that his education expenses fall within the provisions of the regulation. (James A. Carroll, 51 T.C. 213 (1968).)

Appellant contends that each course taken has a direct relationship to his major field of teaching which is mathematics. He has stated that he learned more in his sermon preparation class about developing lecturing skills, improving his students' listening ability, and developing complete organization, than he ever learned in a speech or education class.

Specifically, appellant has taught science, biology, physical education, U.S. history, English, math, reading, and social studies. We cannot conclude that any of the courses offered in the three-year master of divinity program would directly maintain or improve

appellant's skills in his classroom subjects. While the sermon preparation classes may indirectly benefit appellant in his classroom, it does not appear to be appellant's primary purpose for taking the courses. The vast majority of the classes offered relate directly to religion, which would only indirectly benefit a teacher in a secular school. This finding is supported by the school's published philosophy of their program, which is "the preparation of men for the propagation of the faith." The evidence available indicates that appellant has long been active in his church and interested in religion. The primary purpose for obtaining the masters in divinity degree appears to be personal and not for the purpose of improving his teaching skills. It cannot, furthermore, be concluded that the education was ordinary or necessary. Consequently, the action of respondent must be upheld.

We note that appellant has also not shown that the education was needed for the express requirements of his employer. It is well settled that a school district's action in granting salary credits cannot be considered determinative of deductibility. (Appeal of Mary Joan Leonard, Cal. St. Bd. of Equal., Oct. 28, 1980.)

Based on the record before us, appellant has not shown that he qualifies for head of household status, and he has failed to prove that his deduction for educational expenses meets the requirements of section 17202. Accordingly, we must sustain respondent's action.

Appeal of Richard Byrd

## 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 Richard Byrd against a proposed assessment of additional personal income tax in the amount of $326 for the year 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 13th day of December , 1984, by the State Board of Equalization, with Board Members Mr. Nevins, 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