BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROY CHADWICK)

For Appellant: Roy Chadwick, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Marvin J. Halpern
Counsel

OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Roy Chadwick against a proposed assessment of additional personal income tax in the amount of $106.40 and a penalty in the amount of $26.60 for the year 1968.

The principal issue presented is whether appellant is entitled to deduct traveling and living costs incurred while employed in San Francisco and maintaining a family home in Los Angeles.

In December of 1967 appellant obtained a position with the Wells Fargo Bank. As a condition of employment the bank required that he report to its headquarters in San Francisco for a training period of a few months. It was clearly understood that this period would not exceed six months. After training, appellant was to be assigned to any one of the bank's many branches located throughout this state., The bank also specifically stipulated that any moving expenses to San Francisco, living expenses there, and subsequent moving expenses would be his own financial responsibility. Since he could not afford the expense of moving his family twice within a brief time span, appellant decided to take temporary living quarters in San Francisco and.maintain the family home in Los Angeles until he knew where he would ultimately be posted. The training period lasted 'approximately four months, and appellant was then assigned to the Los Angeles area.

During the period he was in San Francisco, appellant incurred expenses of $2,026.14, comprised of the costs of meals and lodging in that city, and of traveling to and from Los Angeles. He deducted these expenses on both his state and federal income tax returns for 1968. Respondent denied the deduction, concluding that appellant was not "away from home" within the meaning of the applicable statute, and therefore did not qualify for a traveling **expense deduction.**

Section 17202, subdivision (a)(2), of the Revenue and Taxation Code allows a deduction for ordinary and necessary traveling expenses, including amounts expended for meals and lodging while away from home in the pursuit of a trade or business, On the other hand, section 17282 of that code disallows a deduction for personal, living, or family expenses. Comparable United States Internal Revenue Code provisions (§§ 162(a)(2) and 262, Int. Rev. Code of 1954) have been construed many times by the federal courts, but not- always with the consistency of theory or result that one might desire.

The basic principles governing traveling expense deductions were laid down long ago in Commissioner v. Flowers, 326 U.S. 46.5. [90 L. Ed. 203]. That case established three conditions for the allowance of such deductions: The expenditures must be reasonable and necessary traveling expenses; they must be incurred "while away from home"; and there must be a direct connection

between the expenditures and the carrying on of the trade or business of the taxpayer or of his employer. The second condition, which is the one at issue in this appeal, has engendered considerable litigation in the lower federal courts because the Supreme Court has never defined "home" for this purpose, despite several opportunities to do so. In Flowers travel expense deductions were disallowed because the expenses were not motivated by "the exigencies of business" and thus did not satisfy the third condition. (See also Peurifoy v. Commissioner, 358 U. S. 59 [3 L. Ed. 2d 30].) In Commissioner v. Stidger, 386 U. S. 287 [18 L. Ed. 2d 53], on the other hand, the Court disallowed a deduction for the cost of meals at a military officer's permanent duty station; on the grounds that the permanent duty station of a military taxpayer was his "home" for travel expense purposes. The court specifically limited this decision to military taxpayers, however, and left open the definition of "home" in other contexts.

Lacking guidance from the Supreme Court, the lower courts have reached varying conclusions on the proper definition of "home". The Tax Court and, at one time or another, most of the Circuit Courts of Appeals that have considered the matter have generally sustained the long-standing position of the Commissioner of Internal Revenue that "home" means the vicinity of the taxpayer's business headquarters or principal place of employment. (See, e. g., Ronald D. Kroll, 49 T. C. 557; Barnhill v. Commissioner, 148 F. 2d 913 (4th Cir. 1945); Markey v. Commissioner, 490 F. 2d 1249 (6th Cir. 1974); Wills v. Commissioner, 411 F. 2d 537 (9th Cir. 1969).) At least one court of appeals, however, still rejects the Commissioner's position and holds that "home" means the taxpayer's permanent residence. (Rosenspan v. United States, 438 F. 2d 905 (2d Cir. 1971); Six v. United States, 450 F. 2d 66 (2d Cir. 1971).)

Although these conflicting definitions might be expected to lead to opposite results in a case like the one at hand, the various exceptions and qualifications engrafted onto the two rules render the differences between them more apparent than real. When a taxpayer maintains a permanent residence in one place, works in another locality, and attempts to deduct the duplicate living expenses incurred at his work location, the trend of recent decisions in all federal courts is to ask whether the taxpayer, under all the circumstances, could reasonably have been expected to move his residence to the vicinity of his employment. (See, e.g., Truman C. Tucker, 55 T. C. 783; Six v. United States, supra; Commissioner v. Mooneyhan, 404 F. 2d 522 (6th Cir. 1968), cert. denied, 394 U. S. 1001 [22 L. Ed. 2d 778].)

The Tax Court approach to the problem is set forth in some detail in Ronald D. Kroll, supra, 49 T. C. at 562-563:

> The purpose of the "away from home" provision is to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses. [Citations.] The "tax home" doctrine is directed toward accomplishing this purpose. In effect, it asks the question whether in a particular case. it is, reasonable to expect the taxpayer to maintain a residence near his trade or business and thereby incur only one set of living expenses, which are of course non-deductible under section 262. If it is reasonable so to expect, as where a taxpayer has only one post of duty, which is permanent, then if he in fact chooses to maintain his residence elsewhere and incur living expenses near his trade or business as well, the duplication of expenses thereby resulting arises not from the needs of his business but from the taxpayer's personal choice. When, then, a taxpayer moves to a new permanent post of employment, it is generally reasonable to expect him to move his residence as well, and if he does not do so, and thereby incurs living expenses at his new post of employment while maintaining his old residence, the duplication again does not arise from business needs, but from personal considerations. If, however, the taxpayer's stay at the new post of business is to be temporary -- "the sort of employment in which termination within a short period could be foreseen" [Citation.]-- it is not reasonable to expect him to move his residence; so if he incurs living expenses. at the temporary post; these are traveling expenses required by the trade or business rather than by personal choice, and they are therefore deductible. [Citations.]

The Second Circuit approach, as established in Rosenspan, recasts the analysis as follows:

> [E]xamination of the string of cases cited by plaintiff as endorsing the "business headquarters" test has revealed almost none, aside from the unique situations involving military personnel considered above, which cannot be

> explained on the basis that the taxpayer had no permanent residence, or was not away from it, or maintained it in a locale apart from where he regularly worked as a matter of personal choice rather than business necessity. This principle likewise affords a satisfactory rationale for the "temporary" employment cases, ... When an assignment is truly temporary, it would be unreasonable to expect the taxpayer to move his home, and the expenses are thus compelled by the "exigencies of business"; when the assignment is -"indefinite" or "indeterminate," the situation is different and, if the taxpayer decides to leave his home where it was, disallowance is appropriate; not because he has acquired a "tax home" in some lodging house or hotel at the worksite but because his failure to move his home was for his personal convenience and not compelled by business necessity. ... [Footnote omitted.] (438 F. 2d at 911-912.)

Whichever path one might choose to follow in this case, the result is the same. We believe that appellant's employment in San Francisco for a training period of no more than six months - four months as it actually turned out - was temporary in nature, and that a reasonable person in appellant's position, faced with the probability of having to move twice in a brief period of time without any reimbursement from his employer, could not have been expected to move his family residence until he received a permanent assignment to a particular location. Accordingly, we find that appellant was "away from home" as a matter of business necessity while he was in San Francisco, and that he is therefore entitled to the travel expense deductions claimed.

Respondent places considerable reliance on Rev. Rul. 60-314, 1960-2 Cum. Bull. 48, and Neff v. Campbell, Jr., 13 Am. Fed. Tax R. 2d 530, which held that employment for test periods of one year and six months, respectively, constituted employment for an "indefinite" period. Both situations are distinguishable from appellant's, however. The one year test period discussed in the revenue ruling is obviously substantially longer than appellant's, and although the period in Neff was approximately the same as here, the taxpayer there was to continue his employment at the same location if he satisfactorily completed his probationary period.

Turning to the penalty question, we note that section 18683 provides for a penalty of 25 percent of any tax deficiency if the taxpayer fails to 'furnish any information' requested in writing by the Franchise Tax Board.,' 'Since we have concluded that there is no deficiency'; 'there' is no basis, for imposing such a penalty.

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 1859'5 of the Revenue and Taxation Code,' that the action of the Franchise Tax' Board on the protest of Roy Chadwick against a proposed assessment of additional, personal income tax in the amount of $106.40 and penalty in the amount of $26. 60 for the year 1968, be and the same is hereby reversed.

Done at Sacramento, California, this 7th day of October, 1974, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary