

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)	
)	No. 92R-0024-CD
MICHAEL N. AND MARDEE SUE MOULIN)	

For Appellants:	Michael N. and Mardee Sue Moulin
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For Respondent:	Edward J. Kline, Counsel
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O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a),^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Michael N. and Mardee Sue Moulin for refund of personal income tax in the amount of \$209 for the year 1989.

^{1/} Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

The issue in this appeal is whether appellants may deduct under the general provision of Internal Revenue Code (I.R.C.) section 162(a) certain meal expenses as ordinary and necessary business expenses.

Appellants were officers of the Los Angeles Police Department during the appeal year. During that year, section 702.20 of the Los Angeles Police Department Manual (Manual) provided that officers assigned to a division were allowed off-duty free time ("Code Seven period") of 45 consecutive minutes during each regular period of duty. Appellants indicate that section 702.20 of the Manual was the regulation applicable to meals taken by an officer during his or her regular period of duty. Section 702.20 of the Manual stated that officers were permitted to go where they chose and do what they chose during a Code Seven period, subject to departmental rules and regulations applicable to off-duty officers. Officers driving a police vehicle were required during a Code Seven period to park the vehicle at a police facility within their assigned division or, after notice to the department of the location, to park the vehicle at any location within their assigned division or approved by their watch commander. (Los Angeles Police Department Manual, section 702.20.) The practical effect of the restriction regarding police vehicles appears to be that appellants ordinarily ate their meals within their assigned divisions during a Code Seven period, but were otherwise free to choose the location, such as a restaurant or the station house, where they would eat their meals. Appellants state that they were not permitted, for reasons of safety, to eat a meal within a police vehicle, but there is no indication in the record that they could not prepare a meal at home and eat it somewhere other than in a police vehicle during a Code Seven period. Although officers in a Code Seven period immediately reverted to on-duty status in an emergency, section 702.20 of the Manual stated that supervisors could not interrupt a Code Seven period for routine matters and that officers should inform a citizen who requested services of a nonemergency nature that they were off-duty and, if necessary, request another police unit to handle the citizen's matter. In view of appellants' failure to provide evidence, or even to make explicit allegations to the contrary, we infer that an officer's meals during a Code Seven period were not typically cut short before they could be eaten.

Appellants filed an amended personal income tax return for 1989 on which they claimed a deduction under I.R.C. section 162(a) "for on-duty meals consumed as a police/public enforcement officer." Respondent treated the amended return as a claim for refund, which it denied, and this timely appeal followed.

Internal Revenue Code section 262 states that "except as otherwise expressly provided in this chapter, no deductions shall be allowed for personal, living, or family expenses." Regulations under I.R.C. section 262 further state that "except as permitted under section 162, 212 or 217, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses." (Treas. Reg. § 1.262-1(b)(5) (as amended in 1972).) The general provision of I.R.C. section 162(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."

The Ninth Circuit Court of Appeals, the United States Tax Court, and the Internal

Revenue Service have recognized that "that which may be a personal expense under some circumstances can, when circumscribed by company regulations, directives, and conditions, lose its character as a personal expense and take on the color of a business expense." (Sibla v. Commissioner, 611 F.2d 1260, 1262 (9th Cir. 1980). Accord, Cooper v. Commissioner, 67 T.C. 870 (1977) [acq. 1985-2 C.B. viii]; affd. sub nom., Sibla v. Commissioner, supra; Belt v. Commissioner, ¶ 84,167 T.C.M. (P-H) (1984).) Placement of that often thin line which distinguishes a "personal expense" from a "business expense" under the Sibla/Cooper standard depends primarily upon the facts and circumstances of each particular case. (See Cooper v. Commissioner, supra, 67 T.C. at 873.)

Relying on Christey v. United States, 841 F.2d 809 (8th Cir. 1988), which applied the Sibla/Cooper standard to the facts of that matter, appellants argue that duty-related restrictions with regard to their meals taken during a Code Seven period converted the expense of those meals from a personal expense to a deductible business expense pursuant to I.R.C. section 162(a). In Christey, the Eighth Circuit Court of Appeals permitted Minnesota State Highway Patrol officers to deduct the cost of their meals while on duty because it concluded that the number of duty-related restrictions and requirements regarding their meals "effectively extended the performance of the troopers' duties from patrol cars on highways to tables in restaurants." (Christey v. United States, supra, 841 F.2d at 812.) The court noted that, in addition to detailing the time at which an officer might eat, the amount of time allowed for a meal, and other matters, the rules and regulations of the Minnesota State Highway Patrol required (1) that an officer eat his meal in a public restaurant adjacent to a highway whenever practical and prohibited him from eating at home during working hours or bringing a lunch from home, (2) that an officer remain on duty during a meal, and (3) that an officer not only respond to an emergency during his meal but also interrupt his meal to provide any information that the general public might seek, e.g., information about road conditions, weather, and traffic laws.^{2/} (Christey v. United States, supra, 841 F.2d at 810, 813.) The court further noted that Minnesota officers were frequently interrupted for emergency and other purposes and were often unable to finish meals for which they had paid. (Christey v. United States, supra.)

Respondent contends that appellants' meal expenses were nondeductible personal expenses. In connection with this contention, respondent argues that, for a number of reasons, Christey was wrongly decided and should not be followed by this board. Respondent also makes the alternative argument that the factual circumstances in this matter more closely parallel the circumstances in Moscini v. Commissioner, ¶ 77,245 T.C.M. (P-H) (1977), than those in Christey and that, as a result, Moscini should be followed here. We agree with respondent's alternative argument.

In Moscini, the taxpayer was a police officer employed by the City of South San Francisco. Although he was not permitted to leave the city limits during his shift, to carry a bag

^{2/} According to the court, the Minnesota rules and regulations stated that their principal purpose was "to promote public safety and obedience to the law through the physical presence of troopers in uniform and to facilitate, through availability to the public, the reporting of accidents and the dissemination of information with reference to the traffic and motor vehicle laws of the state." (Christey v. United States, supra, 841 F.2d at 810.)

lunch, or to eat food in his patrol car for his meal break, and was required to be available to handle emergency calls at any time during his shift, he "personally chose which restaurant he would patronize within the South San Francisco city limits, he only purchased those meals which he desired to purchase, and there was no evidence that he was ever required to purchase a meal which he could not eat because of his police duties." (Moscini v. Commissioner, supra, ¶ 77,245 T.C.M. (P-H) at 77-1004 (1977).) In holding that the taxpayer's meals were personal expenses, the court in Moscini found that the restrictions on the manner in which the taxpayer in that case could take his meals while on duty were not so significant that they transformed an essentially personal expense into a business expense.^{3/} (Moscini v. Commissioner, supra.) Because we think that appellants enjoyed at least as much freedom from restrictions during their meal periods as the taxpayer in Moscini, and certainly more freedom than the taxpayers in Christey, we conclude that appellants' meal expenses during their Code Seven periods were nondeductible personal expenses. Therefore, respondent's action must be sustained.

^{3/} Moscini was decided before Sibla but after Cooper. The tax court in Moscini cited Cooper with approval and seemingly applied a legal standard in reaching its decision that was identical to that which the Ninth Circuit Court of Appeals explicitly stated later in Sibla, supra ("the Sibla/Cooper standard" referred to earlier in this opinion).

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Michael N. and Mardee Sue Moulin for refund of personal income tax in the amount of \$209 for the year 1989, be and the same is hereby sustained.

Done at Sacramento, California, this 13th day of January, 1993, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Fong, Mr. Dronenburg and Ms. Scott present.

Brad Sherman, Chairman

Matthew K. Fong, Member

Ernest J. Dronenburg, Jr., Member

Windie Scott*, Member

_____, Member

*For Gray Davis, per Government Code section 7.9