BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 91R-0742-JV
MAURICE AND LAINEY TOFIG	)	

Appearances:

For Appellants:	Thomas Sullivan Certified Public Accountant
For Respondent:	H. Kent Holman Counsel

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 claims of Maurice and Lainey Tofig for refund of personal income tax in the amounts of $3,332 and $5,431 for the years 1987 and 1988, respectively.

[1/] Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

Appellant-husband is an agent for Allstate Insurance Company (Allstate). All references to appellant are to him.

The parties agree that appellant is an employee of Allstate. The question presented by this appeal is whether appellant is a "statutory employee" or a "common law employee."

Appellant began his employment with Allstate when the parties signed an Allstate Agent Compensation Agreement, effective August 28, 1977. Subsequently, appellant and Allstate executed a Neighborhood Office Agent Amendment, effective August 1, 1986, which operated as an amendment to the Allstate Agent Compensation Agreement.

As a Neighborhood Office Agent, appellant continued to be a full-time employee of Allstate receiving a base salary plus commissions on new and renewal policies; however, appellant was also allowed to operate his own insurance office under the supervision of Allstate. He was responsible for leasing his own office space as well as paying certain other expenses such as compensation for his own agents and clerical help, telephone, advertising, and postage. Though appellant paid the above listed expenses, Allstate provided appellant with a monthly reimbursement, known as a office expense allowance (OEA). The OEA was determined by a prescribed formula and appellant was allowed to use it to offset certain authorized expenses, such as, rent, clerical expenses, postage, etc. Additionally, as a Neighborhood Office Agent, appellant received commissions on any sale of auto, homeowners, life and various other types of insurance policies made by his office.

Appellant originally reported his W-2 compensation on line 7 (wages, salaries, tips, etc.) of form 1040, his reimbursed employee business expenses as adjustments to income, and his unreimbursed expenses on schedule A as miscellaneous itemized deductions which were only deductible to the extent they exceeded two percent of adjusted gross income. (I.R.C. § 67.) Appellant subsequently filed amended returns which included all the Allstate compensation and business expenses on schedule C, which is used to report profit or loss from sole proprietorships. Because the deductibility of business expenses on schedule C is not subject to a two-percent floor, appellant's deductions were increased, his taxable income decreased, and he filed refund claims with both the respondent and the Internal Revenue Service (IRS) for the appeal years. These refund claims were based on Revenue Ruling 90-93, 1990-2 C.B. 33, which provides that certain types of full-time insurance salesmen may qualify as "statutory employees" under Internal Revenue Code (I.R.C.) section 3121(d)(3), rather than "common law employees," and, as such, may use schedule C of form 1040 to determine net profit or loss.

Upon review, respondent and the IRS determined that appellant was not a statutory employee under I.R.C. section 3121(d)(3), but rather, a common law employee. Therefore, both denied appellant's claims for refunds.

I.R.C. section 3121(d) describes several categories of individuals who are treated as employees for purposes of applying the FICA tax provisions. One such category is composed of

individuals in specified occupational groups who are not common law employees. (I.R.C. § 3121(d)(3).) Employees in this category are referred to as "statutory employees." Full-time life insurance salesmen are included in the category of statutory employees.

Treasury Regulation section 31.3121(d)-1(d)(iii)(2) defines a full-time life insurance salesman for purposes of I.R.C. section 3121(d)(3) as "an individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company." A full-time life insurance salesman will not qualify as a "statutory employee" under section 3121(d)(3) if such individual has a substantial investment in the facilities used in connection with the performance of the contracted services. (I.R.C. § 3121(d)(3)(B).)

Based upon the foregoing, in order for the appellant to qualify as a statutory employee under section 3121(d)(3), he must show the following: (1) that his entire or principal business activity was devoted to the solicitation of life insurance or annuity contracts; (2) that he did not have a substantial investment in the facilities used in connection with the performance of his services; and, (3) that he is not a common law employee.

With regard to whether appellant's entire or principal business activity was devoted to the solicitation of life insurance or annuity contracts, appellant argues that though his life insurance commissions only represented approximately 50 percent of his gross commissions for the appeal years, he spent his full time selling life insurance. The remainder of his commission income consisted of casualty insurance commissions generated by his paid staff.

It is a well-established rule that respondent's determinations as to issues of fact are presumed correct and the taxpayer has the burden of proving such determinations erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949).) To overcome the presumed correctness of respondent's findings as to issues of fact, a taxpayer must introduce credible evidence to support his assertions. When the taxpayer fails to support his assertions with such evidence, respondent's determinations must be upheld. (Buchanan v. Commissioner, 20 B.T.A. 210 (1930); Appeal of James C. and Monablanche A. Walshe, Cal. St. Bd. of Equal., Oct. 20, 1975; Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977.) Unsupported allegations of fact are insufficient to carry the appellant's burden of proof to rebut the presumption that respondent's determination is correct. (See, e.g., Appeal of Thomas A. Beckett Investment Co., Cal. St. Bd. of Equal., July 22, 1952.) Appellant has not provided us with any credible evidence to support his assertions, and thus, appellant has failed to meet his burden to prove that his entire or principal business activity was devoted to the solicitation of life insurance or annuity contracts.

Rather, the record indicates that appellant's contract with Allstate contemplates that appellant will personally sell many types of insurance, not just life insurance. That these contract provisions were carried out by appellant is supported by an analysis by the IRS of appellant's monthly compensation, showing his commissions from new life insurance and annuity policies as only 45 percent of all new commissions for 1987 and 36 percent in 1988. The IRS analysis also indicates that by taking

into account other factors, such as awards received by appellant pertaining to the sales of other types of insurance or production allowance credits, which are credits paid to appellant for training other agents or speaking at motivational meetings, the percentage of commissions from life insurance and annuities is even lower. These factors satisfy us that appellant's entire or principal business activity was not devoted to the solicitation of life insurance or annuity contracts is correct.

Because appellant's entire or principal business activity was not devoted to the solicitation of life insurance or annuity contracts, we must conclude that appellant has failed to qualify as a statutory employee under I.R.C. section 3121(d)(3). Therefore, we need not consider the other requirements listed above.

On the basis of the reasons set forth above, we must sustain respondent's action in this matter.

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 claims of Maurice and Lainey Tofig for refund of personal income tax in the amounts of $3,332 and $5,431 for the years 1987 and 1988, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of October, 1993, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, Mr. Fong, 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

Tofig.jv