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T.C. Summary Opinion 1998-208

UNITED STATES TAX COURT

BERNARD AND BRENDA STEPPES, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 1083-96S, 5844-96S. Filed October 15, 1998.

Bernard and Brenda Steppes, pro se.

Jason Silver, Joseph Park, and Daniel Whitley, for respondent.

NAMEROFF, Special Trial Judge: These consolidated cases were heard pursuant to the provisions of section 7463.[1] The decisions to be entered are not reviewable by any other court, and this opinion should not be cited as authority.

Respondent determined deficiencies in petitioners' 1993 and 1994 Federal income taxes in the respective amounts of $6,873 and $4,403. Respondent also determined that petitioners are liable

[1] All section references are to the Internal Revenue Code in effect for the years at issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

for accuracy-related penalties under section 6662(a) in the respective amounts of $1,375 and $881. After concessions by both parties,[2] the issues remaining are: (1) Whether petitioners are entitled to a dependency exemption deduction in 1993 for David Bonilla; (2) whether petitioners are entitled to deductions for various employee business expenses for each of the years 1993 and 1994; and (3) whether petitioners are liable for the accuracy-related penalty for each of the years 1993 and 1994. Some of the facts have been stipulated, and they are so found. Petitioners resided in Los Angeles, California, at the time their petitions were filed with the Court.

Background

Petitioner Brenda Steppes (Mrs. Steppes or petitioner) is an elementary school principal. She received her bachelor's degree from the University of California Berkeley in 1968 and a teaching credential and master's degree in 1970. Shortly thereafter, she came to Los Angeles and became a bilingual teacher. Thereafter,

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[2] Respondent conceded that petitioners were entitled to dependency exemption deductions in each of the taxable years 1993 and 1994 for their children Ari Steppes and Emily Steppes. Petitioners conceded that they were not entitled to a dependency exemption deduction in 1994 for David Bonilla. Petitioners also conceded that their gross income for 1993 included $3,750, described in the notice of deficiency as an IRA distribution. In connection with miscellaneous employee business expenses subject to the 2-percent limitation, respondent concedes that petitioners are entitled in each of the years 1993 and 1994 to deductions for union dues of $1,321.40, professional associations of $433, faculty funds of $50, and subscriptions of $46. Respondent further concedes that petitioners are entitled to itemized deductions for accounting expenses in 1993 and 1994 of $240 and $305, respectively.

she was a bilingual coordinator, assistant principal, and finally, a principal in the Los Angeles Unified School District (LAUSD). Prior to 1992, she was principal at the Hancock Park Elementary school.

During that time, petitioner worked on a committee with the Lt. Governor of the State of California in connection with preventing hate crimes. The committee met at various places in California. When the committee met near San Luis Obispo, petitioner met people from the San Luis Obispo School District (SLOSD). She was offered a job as principal in that system in order to help the city come up with a plan for students with a limited English proficiency, a problem new to that area of the State. Petitioner accepted the job, obtained a leave of absence from LAUSD, and moved to San Luis Obispo with petitioners' daughter. Mr. Steppes, also a teacher, remained in Los Angeles with their son.

Petitioner's employment with SLOSD ran from July 1992 to June 1993. Petitioner had signed a 1-year contract and was on tenure track for the SLOSD. She rented quarters in San Luis Obispo for $800 a month. At the end of the school year in 1993, petitioner returned to Los Angeles and began to work again in the Los Angeles school system. However, she continued to act as a consultant to SLOSD through February of 1994.

LAUSD has a policy of permitting teachers and principals to take "opportunity leave" for a year without losing their tenure position within the school system. When petitioner returned to

LAUSD, she became principal at the Roscomare Road school in Bel Air until she applied for and obtained the principal's job at Magnolia school, where she currently is employed.

As indicated, petitioner Bernard Steppes is also in the teaching profession. He received his bachelor's degree from the University of Arkansas and a master's degree from the University of Southern California in 1980. During the years before the Court, Mr. Steppes was a fifth grade teacher.

Mrs. Steppes claimed the following employee business expenses on the joint Federal income tax returns for 1993 and 1994.

Item	1993	1994
Vehicle	$4,512	$6,457
Parking	55	203
Travel	8,540	3,801
Business expenses	8,206	8,946
Meals	3,344	1,900
Total	24,657	21,307

The "business expenses" item consisted of the following:

Dues	$800	$1,809
Depreciation	1,088	1,091
Office expense	3,794	-0-
Telephone	800	1,246
Conference fees	1,206	1,389
Teaching aids	518	3,411
Total	8,206	8,946

Similarly, Bernard Steppes claimed the following expenses as unreimbursed employee expenses for 1993 and 1994.

Item	1993	1994
Vehicle	$1,736	$2,323
Parking	-0-	201
Travel	-0-	2,005
Business expenses	7,579	8,911
Meals	400	-0-
Total	9,715	13,440

The "business expenses" set forth above consisted of:

Dues	$400	$1,612
Depreciation	1,818	653
Office expense	2,118	-0-
Telephone	48	446
Conference fees	-0-	1,611
Teaching aids	3,195	4,589
Total	7,579	8,911

In the notices of deficiency, respondent disallowed all of the claimed business expenses for lack of substantiation. In addition to the concessions described in footnote supra note 2, the parties filed a stipulation of settled issues which reflects that petitioners are entitled to deductions for business mileage of $337.68 for 1993 based on 1,206 miles; and travel expense of $1,795.35, union dues of $100, car and truck expenses of $3,491.66, supplies expenses of $297.47, and employment-related books of $450.74 for 1994.

These cases were initially set for trial in Los Angeles on January 13, 1997. Petitioners appeared on that date and moved for a continuance on the ground that all of their records had been stolen 2 months earlier and that they had begun the process of reconstructing their records. The Court granted the continuance. Trial was begun in these cases on March 19, 1997, continued to June 4, 1997, again to July 29, 1997, and ended on November 18, 1997. Throughout these proceedings, petitioners were advised by the Court that it was their obligation to substantiate the items claimed on their returns, whether by original or reconstructed records. After much aggravation and delay, petitioners were able to obtain some records from their

bank, which ultimately resulted in a supplemental stipulation of facts, which will be described hereinafter, and the stipulation of settled issues. However, other than those filings, and a few scattered credit card statements, the record is barren of substantiating documentation.

Petitioners' returns for 1993 and 1994 were prepared by the Joffe Tax Service (Joffe). Allegedly, petitioners gave all their records to a representative of that company, who prepared work papers and ultimately the tax returns. A representative of Joffe testified and produced some work papers used in the preparation of the tax returns. However, that witness was not the person who prepared those work papers, and none of the work papers reflected copies of petitioners' documents or detailed listings from petitioners' documents. The witness had been involved in petitioners' cases only for the purpose of preparing them for meeting with respondent's Appeals section subsequent to the issuance of the notice of deficiency. The witness had not seen any of petitioners' records, and, as indicated earlier, those records were subsequently stolen.

Discussion

1. Dependency Exemption. On their 1993 Federal income tax return, petitioners claimed a dependency deduction for David Bonilla. David Bonilla, born in 1987, was the son of petitioners' babysitter. Petitioner exchanged room and board for Mrs. Bonilla and her child for the babysitting services. Mrs. Bonilla took care of her child, and there is no evidence in the

record that petitioners contributed directly to the support of David Bonilla.

Section 151(c) allows taxpayers to deduct an annual exemption for each "dependent", as defined in section 152. Under section 152(a), the term "dependent" means certain individuals over half of whose support was received from the taxpayer during the taxable year in which such individuals are claimed as dependents. Eligible individuals who may be claimed as dependents include, among others, a member of a taxpayer's household. Sec. 152(a)(9). Petitioners paid room and board to Mrs. Bonilla for her services. These payments were compensation to Mrs. Bonilla and were used by her to support David Bonilla. The payments do not constitute support within the meaning of section 152(a)(9). Protiva v. Commissioner, T.C. Memo. 1970-282. Accordingly, petitioners did not contribute more than 50 percent of David Bonilla's support. We hold that petitioners are not entitled to a dependency exemption deduction for David Bonilla for 1993.

2. Away-From-Home Expenses. Section 162(a)(2) allows taxpayers to deduct "the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * traveling expenses (including amounts expended for meals and lodging * * *) while away from home in the pursuit of a trade or business". The Supreme Court has established a three-prong test for allowing deductions under section 162(a)(2). The expense must be (1) reasonable and

necessary, (2) incurred while away from home, and (3) incurred in the pursuit of a trade or business. Commissioner v. Flowers, 326 U.S. 465, 470 (1946).

As a general rule, if a taxpayer is employed permanently or for an indefinite time away from his usual abode, "home" for the purposes of section 162(a)(2) means the vicinity of the taxpayer's principal place of employment and not where his or her personal residence is located. Coombs v. Commissioner, 608 F.2d 1269, 1275 (9th Cir. 1979), affg. in part and revg. in part 67 T.C. 426 (1976); Mitchell v. Commissioner, 74 T.C. 578, 581 (1980). However, under the exception to this rule, a taxpayer's personal residence may be the "tax home" if the principal place of business is "temporary", rather than "indefinite". Peurifoy v. Commissioner, 358 U.S. 59, 60 (1958). The reason for not shifting the taxpayer's "tax home" to the temporary place of employment is "to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode". Kroll v. Commissioner, 49 T.C. 557, 562 (1968).

A place of business is a "temporary" place of business if the employment is such that "termination within a short period could be foreseen". Albert v. Commissioner, 13 T.C. 129, 131 (1949). Conversely, employment is "indefinite", "substantial", or "indeterminate" if "its termination cannot be foreseen within a fixed or reasonably short period of time." Stricker v. Commissioner, 54 T.C. 355, 361 (1970), affd. 438 F.2d 1216 (6th

Cir. 1971). If employment which is "temporary" at its inception becomes "substantial", "indefinite", or "indeterminate" in duration, the situs of the "tax home" is the location of the taxpayer's employment.[3] Kroll v. Commissioner, supra. Employment may change from temporary to indefinite due to changed circumstances, or simply the passage of time. Norwood v. Commissioner, 66 T.C. 467, 470 (1976). Whether employment is temporary or indefinite is a question of fact. Peurifoy v. Commissioner, supra at 60-61. "No single element is determinative of the ultimate factual issue of temporariness". Norwood v. Commissioner, supra at 470. A taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year.[4] Sec. 162(a).

The Court of Appeals for the Ninth Circuit has construed the "temporary versus indefinite" distinction as follows:

> An employee might be said to change his tax home if there is a reasonable probability known to him that he may be employed for a long period of time at his new station. What constitutes "a long period of time" varies with circumstances surrounding each case. If such be the case,

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[3] The purpose of this rule is clear. It is not reasonable to expect people to move to another location for a temporary job. Kasun v. United States, 671 F.2d 1059, 1061 (7th Cir. 1982). The exigencies of temporary employment may require the taxpayer to incur more substantial costs than might be incurred in employment of indefinite duration. Rosenspan v. United States, 438 F.2d 905, 912 (2d Cir. 1971). A deduction for these expenses eases the burden on taxpayers who must bear the expenses of living on the road while maintaining a personal residence. Id. at 912; Bochner v. Commissioner, 67 T.C. 824, 828 (1977).

[4] The Energy Policy Act of 1992, Pub. L. 102-486, sec. 1938(a), 106 Stat. 2776, 3033, amended sec. 162(a) by adding the one-year rule. The effective date was Dec. 31, 1992.

> it is reasonable to expect him to move his permanent abode to his new station, and thus avoid the double burden that the Congress intended to mitigate. * * * [Harvey v. Commissioner, 283 F.2d 491, 495 (9th Cir. 1960), revg. 32 T.C. 1368 (1959); emphasis added.]

Petitioner took leave from her position with LAUSD and signed a one-year contract to work for SLOSD. She incurred temporary lodging expenses; she did not abandon the family homestead in Los Angeles which remained the homestead for Mr. Steppes and their son. At the end of the one-year contract, petitioner returned to Los Angeles and resumed her principal's roles with LAUSD. However, she continued to consult from time to time with SLOSD to finalize the project which she had started. Petitioner's employment with SLOSD can be considered temporary, as it comes within the one-year rule required by section 162(a).[5] Under the facts presented here, we hold that petitioner was temporarily away from home for the first 6 months of 1993 and is entitled to deduct her away-from-home expenses to the extent that they can be substantiated.

Deductions are a matter of legislative grace, and taxpayers must prove that they are entitled to the claimed deductions. Rule 142(a); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992). They must keep sufficient records to establish deduction amounts. Sec. 6001; Meneguzzo v. Commissioner, 43 T.C. 824, 831-

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[5] The one-year rule in sec. 162(a) applies to costs paid or incurred after Dec. 31, 1992. Although petitioner's one-year contract overlapped this date and only the 6 months at issue for 1993 are covered by the amendment, petitioner's employment with SLOSD qualifies as temporary regardless of how the effective date is interpreted.

832 (1965). Generally, except as provided by section 274(d), when evidence shows that a taxpayer incurred a deductible expense, but the exact amount cannot be determined, the Court may approximate the amount. Cohan v. Commissioner, 39 F.2d 540, 543-544 (2d Cir. 1930). The Court, however, must have some basis upon which an estimate may be made. Vanicek v. Commissioner, 85 T.C. 731, 742-743 (1985).

A strict substantiation requirement exists under section 274(d)(4) for certain items listed under section 280F(d)(4) such as passenger automobiles. Taxpayers must substantiate by adequate records the following items in order to claim automobile deductions: The amount of each automobile expenditure, the automobile's business and total usage, the date of the automobile's use, and the automobile's business purpose. Sec. 274(d); sec. 1.274-5T(b)(6) and (c)(1), Temporary Income Tax Regs., 50 Fed. Reg. 46016 (Nov. 6, 1985).

To substantiate a deduction by means of adequate records, a taxpayer must maintain an account book, diary, log, statement of expense, trip sheets, and/or other documentary evidence which, in combination, are sufficient to establish each element of expenditure or use. Sec. 1.274-5T(c)(2)(i), Temporary Income Tax Regs., 50 Fed. Reg. 46017 (Nov. 6, 1985). Section 274(d) is an exception to the Cohan rule and prohibits the estimation of these expenses. Sanford v. Commissioner, 50 T.C. 823, 827-828 (1968), affd. per curiam 412 F.2d 201 (2d Cir. 1969); sec. 1.274-5T(a), Temporary Income Tax Regs., 50 Fed. Reg. 46014 (Nov. 6, 1985).

The loss of tax records does not leave a taxpayer helpless in meeting his or her substantiation burden. In general, when a taxpayer's records have been lost or destroyed through circumstances beyond his or her control, the taxpayer is entitled to substantiate the deductions by reconstructing expenditures through other credible evidence. Malinowski v. Commissioner, 71 T.C. 1120, 1125 (1979); Cook v. Commissioner, T.C. Memo. 1991-590.

According to petitioners, the away-from-home expenses consisted of mileage, lodging, and meals. With regard to mileage, we cannot tell from the tax return or from the preparer's work papers what amount was deducted for mileage in connection with the away-from-home portion of petitioner's activities. In the supplemental stipulation of facts, the parties stipulated that petitioners contend that they are entitled to car mileage of 7,638 miles relating to petitioner's travel to and from her position at SLOSD. The parties further stipulated that respondent concedes that petitioners are entitled to claim business mileage based on 1,206 miles. San Luis Obispo is 201 miles from Los Angeles, according to the supplemental stipulation of facts, and 1,206 miles would represent three round trips from Los Angeles to San Luis Obispo. There is no evidence in the record to support any deduction in excess of what respondent has conceded. We hold that petitioners are entitled to a deduction based upon 1,206 miles.

In the supplemental stipulation of facts, the parties stipulated that petitioners calculated their travel expenses for 1993 by applying the standard per diem rates provided by the Internal Revenue Service for 1993. The parties further stipulated that petitioners contend that petitioner spent 243 days in San Luis Obispo. Thus petitioners claim a deduction for lodging of $16,038 based upon $66 per day (notwithstanding petitioner's testimony that she rented space for herself and her daughter for $800 per month) and $6,804 for meals expense based upon $28 per day.

Under certain circumstances, rather than requiring that a taxpayer substantiate the amount of expenses incurred for meals and lodging, a per diem allowance may be allowed when a taxpayer satisfies all of the other requirements of sections 162(a) and 274(d). Sec. 274(d); sec. 1-274-5T(j), Temporary Income Tax Regs., 50 Fed. Reg. 46032 (Nov. 6, 1985); Rev. Proc. 93-21, 1993-1 C.B. 529. This amount will be deemed substantiated so long as the elements of time, place, and business purpose have been substantiated.

In this instance petitioners have failed to substantiate adequately all the elements to permit a deduction based upon the per diem rates. There is no proof of the time spent in San Luis Obispo. While we are satisfied that petitioner did spend much of the first half of 1993 there, there is also evidence that she traveled to Los Angeles at least every other weekend. We also note that there are school holidays which have not been accounted

for. Moreover, we do not even know the last day of the school term. Finally, as to petitioner's lodging expense there is no corroborating evidence as to the timing or amounts of the rental payments. Accordingly, we hold that petitioners are not entitled to deductions for meals and lodging for away-from-home expenses.

3. Other Expenses. Petitioners spent $106.32 during 1994 on subscriptions to the Los Angeles Times, a newspaper of general circulation in the Los Angeles area. Petitioner testified that she would take the Los Angeles Times to school to be used in a classroom. We have reservations about petitioner's testimony in this regard in that she was a principal, not a teacher, and therefore did not have a classroom. In any event, we hold that this expenditure would not be an ordinary and necessary business expense.

Petitioners spent $1,378.41 during 1994 on telephone expenses, for which they contend they are entitled to deduct one-half as business expenses. To the extent the disputed deductions represent the cost of residential basic local telephone service, section 262(b) prohibits the deductibility of that expenditure regardless of any business use. Moreover, to the extent petitioners incurred any toll charges for long distance service, they are required to identify these charges as personal or business calls. Respondent agrees that petitioners are entitled to deduct $138 for telephone expenses. Petitioners have not shown that any additional amount constitutes an ordinary and

necessary business expense. Accordingly, we hold that petitioners are entitled to deduct only $138.

Petitioners spent $773.41 during 1994 for cellular phone expenses and contend that three quarters of that amount constitutes an ordinary and necessary business expense. A cellular phone is listed property under section 280F(d)(4), subject to the substantiation requirements of section 274(d) as to business usage and business purpose. Petitioners have not shown that such expenses are ordinary and necessary business expenses. In particular with regard to the telephone expenses and the cellular expenses, petitioners could have easily obtained copies of the original bills from the servicing companies and testified with regard to the business nature of the various calls. We sustain respondent as to this adjustment.

Petitioners spent $600 at Fedco in 1994. Petitioners contend that they made purchases for business at Fedco and purchases for personal expenses at other stores. However, petitioners have not shown what items were purchased, nor have they established that the items were ordinary and necessary business expenses. Accordingly, we sustain respondent as to this item.

In 1994, petitioners spent $1,388.32 on computer equipment and supplies. A computer is also listed property under section 280F(d)(4), subject to the substantiation requirements of section 274(d). Petitioner testified that she used the computer solely for business purposes. She detailed the uses to which she put

this computer, and the Court finds that her testimony was credible on this regard. Furthermore, petitioners have verified the amount that they spent on the computer equipment. Respondent stipulated that if petitioner is entitled to a deduction in regard to this item, then petitioners are entitled to deduct the full amount under section 179, rather than having to capitalize and amortize the costs. We find that petitioners have satisfied the substantiation requirements of section 274(d). See Ward v. Commissioner, T.C. Memo. 1997-106. Accordingly, we hold for petitioner on this item.

The record contains copies of four credit card statements--one for November 1993 and three for three periods in 1994, apparently offered to substantiate meals and lodging expenses other than addressed above. Other than some handwritten notes on two of these documents, there is no evidence adequately identifying any expenditures shown thereon as being deductible under the provisions of section 274(d).

Finally, in addition to respondent's concession regarding book purchases, the record reflects that petitioner spent $84.94 in 1994 for books. However, petitioners have not established what books were purchased or how they were related to petitioners' education businesses. Accordingly, we sustain respondent with respect to this adjustment.

We note that Bernard Steppes was sworn in as a witness, but other than supporting Mrs. Steppes' testimony, he offered nothing whatsoever with regard to his claimed business expenses.

4. Accuracy-Related Penalty. Section 6662 imposes a penalty equal to a 20-percent portion of the underpayment attributable to, inter alia, negligence or disregard of rules or regulations. "Negligence" includes failure to make a reasonable attempt to comply with the law, and the term "disregard" includes careless, reckless or intentional disregard. Sec. 6662(c). Failure to maintain adequate records constitutes negligence. Crocker v. Commissioner, 92 T.C. 899, 917 (1989); Schroeder v. Commissioner, 40 T.C. 30, 34 (1963).

Petitioners failed to show that they maintained adequate records in support of their claimed deductions in excess of respondent's conceded amounts. Further, petitioners did not adequately reconstruct the records which were allegedly stolen.

The fact that petitioners' tax return preparer may have been responsible for the claiming of these improper Schedule C deductions does not affect our decision. Petitioners bear the ultimate responsibility for the accuracy of their tax return. Magill v. Commissioner, 70 T.C. 465, 479-480 (1978), affd. per order 651 F.2d 1233 (6th Cir. 1981). Petitioners have not shown that they provided their preparer with all the necessary facts upon which to base the legitimacy of the claimed deductions.

Notwithstanding the fact that petitioners had their returns prepared by a tax preparation service and had their records stolen just prior to a meeting with the Internal Revenue Service, petitioners were given adequate time to reconstruct their records by documentation or other corroborative witnesses. They failed

to do so. Accordingly, we hold that petitioners are liable for the accuracy-related penalty for each of the taxable years 1993 and 1994.

Reviewed and adopted as the report of the Small Tax Case Division. To reflect the concessions and holdings of this Court,

Decisions will be entered under Rule 155.