T.C. Summary Opinion 2020-28

UNITED STATES TAX COURT

JESUS M. SANTILLAN, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 24305-18S. Filed November 9, 2020.

Jesus M. Santillan, pro se.

Estevan D. Fernandez, for respondent.

SUMMARY OPINION

PANUTHOS, Special Trial Judge: This case was heard pursuant to the provisions of section 7463 of the Internal Revenue Code in effect when the petition was filed.[1] Pursuant to section 7463(b), the decision to be entered is not

[1]Unless otherwise indicated, all section references are to the Internal
(continued...)

reviewable by any other court, and this opinion shall not be treated as precedent for any other case.

In a notice of deficiency dated September 4, 2018, respondent determined a deficiency in petitioner's Federal income tax for taxable year 2015 of $6,840 and a section 6662(a) accuracy-related penalty of $1,368. Respondent further determined a deficiency in petitioner's Federal income tax for taxable year 2016 of $6,942 and a section 6662(a) accuracy-related penalty of $1,388.

After concessions,[2] the issues for decision[3] are:

(1) whether petitioner is entitled to claim a filing status of single for tax years 2015 and 2016 (years in issue); and

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[1](...continued)
Revenue Code in effect for all relevant times and all Rule references are to the Tax Court Rules of Practice and Procedure. We round monetary amounts to the nearest dollar.

[2]Petitioner concedes that he is not entitled to deduct on Schedule A, Itemized Deductions, additional home mortgage interest and points not reported on Form 1098, Mortgage Interest Statement, of $8,888 for tax year 2015. Respondent concedes that petitioner is entitled to deduct on his 2015 Schedule A additional real estate taxes of $727 and points not reported on Form 1098 of $1,802. Respondent also concedes that petitioner is not required to include in income State refunds, credits, or offsets of $2,234 for tax year 2016. Respondent further concedes that petitioner is not liable for an accuracy-related penalty under sec. 6662(a) for either year in issue.

[3]Other adjustments made in the notice of deficiency are computational and need not be addressed.

(2) whether petitioner is entitled to deduct unreimbursed employee business expenses of $26,969 and $31,372 for tax years 2015 and 2016, respectively.

Background

Some of the facts have been stipulated, and we incorporate the stipulation and accompanying exhibits by this reference. The record consists of the stipulation of facts as supplemented with attached exhibits and petitioner's testimony.

Petitioner lived in California when the petition was timely filed.

I. Petitioner's Marriage

Petitioner and his wife were legally married in California in 2013. During tax year 2015 the couple separated. Petitioner's wife and children remained in the family home while he moved into his mother's home. He continued to pay the mortgage on the family home. At the time of trial, petitioner and his wife had not initiated legal divorce proceedings.

II. Petitioner's Professional Background

During the years in issue petitioner was a Southwest Carpenters Union journeyman carpenter employed primarily by Power Scaffold Services (Power Scaffold). Power Scaffold is a scaffold construction company headquartered in Bakersfield, California. The company also maintains an office in Long Beach,

California. In his work at Power Scaffold petitioner was responsible for erecting, dismantling, and maintaining scaffold structures at various project sites.

Petitioner did not work out of Power Scaffold's offices. Instead, he would receive a dispatch from the company giving a description of a project and its location. If petitioner chose to accept the project, he would drive directly from his home to the project worksite. His work consisted of two types of projects: "outages" and maintenance. For outages, petitioner was expected to travel from his home to a project site and stay overnight in a hotel near the site until the project was completed. During the years in issue, petitioner worked on outage projects in Victorville and San Diego, California, for an estimated total of 22 days per year. When he was not working on an outage project, petitioner drove from his home to other project sites daily during the workweek to perform scaffolding maintenance. Most of petitioner's work was classified as maintenance work.

Power Scaffold provided its employees with travel pay on projects that required a drive of two or more hours. If a project did not compensate an employee for travel, the employee was notified before accepting the project and given the option to decline the work and accept a different project. Petitioner received travel reimbursements from Power Scaffold of $4,670 in 2015 and $7,650

in 2016. The travel reimbursements were not included in petitioner's wages on his Form W-2, Wage and Tax Statement, for either tax year.

Petitioner's job required him to wear certain protective clothing including steel-toed boots, safety glasses, leather gloves, a hard hat, fire-resistant clothing and, at times, a face covering. His work also required tools such as scaffold ratchets, hammers, and tape measures. During the years in issue, petitioner personally purchased job-specific protective clothing, tools, and other supplies that he used in his work.

Power Scaffold policy provided that its employees were not expected to incur any expenses other than travel expenses. If an employee did incur other expenses, the company would reimburse the employee. Power Scaffold's records reflect that petitioner was reimbursed only for travel expenses and that he was not paid a per diem during the years in issue. Petitioner did not request reimbursement for his other expenses.

III. Petitioner's Records, Tax Returns, and Filing Status

Petitioner timely filed his individual Federal income tax return for each of the years in issue. He hired a professional tax return preparer to prepare his returns. He provided bank statements and receipts to the tax return preparer.

Petitioner was legally married to his wife throughout the years in issue. Nevertheless, petitioner checked the box for single filing status on Form 1040, U.S. Individual Income Tax Return, for each of the years in issue.[4] He reported gross income of $70,915 for tax year 2015 and $76,024 for tax year 2016.

For the years in issue, petitioner's tax returns included Schedules A on which he claimed various deductions totaling $55,947 for 2015 and $53,894 for 2016 including, as relevant here, the following unreimbursed employee expenses as reported on Form 2106, Employee Business Expenses, for tax year 2015 and Form 2106-EZ, Unreimbursed Employee Business Expenses, for tax year 2016:

Form 2106 expenses	2015	2016
Vehicle	$15,784	$11,483
Parking, fees, tolls, and transportation	---	11,483
Travel expenses while away from home overnight	2,600	6,056
Meals and entertainment (multiplied by 50%)	---	1,800
Business expenses	2,765	---
Total Form 2106 expenses	21,149	30,822

[4]Petitioner's spouse filed an individual Federal income tax return for each of the years in issue, electing a filing status of head of household.

In addition to the expenses reported on the 2015 Form 2106, petitioner included a tax year 2015 unreimbursed expense statement reporting an additional $5,820 of unreimbursed expenses (consisting of $240 for union and professional dues, $2,501 for uniforms and protective clothing, $1,560 for laundry, $1,056 for cellular phone use, and $463 in cellular phone equipment). The unreimbursed employee expenses reported on line 21 of petitioner's 2015 Form 1040 totaled $26,969.

Petitioner's tax year 2016 unreimbursed expense statement reported expenses of $550 for union and professional dues in addition to the total unreimbursed employee expenses listed on the Form 2106-EZ. Thus, the unreimbursed employee expenses reported on line 21 of petitioner's 2016 Form 1040 totaled $31,372.

For tax year 2015 petitioner reported an average daily round-trip commuting distance of 40 miles. Despite this, of the 32,155 miles petitioner drove that year as reported on his Form 2106, he reported 2,400 commuting miles. He reported an additional 27,450 business miles which were used to calculate his vehicle expenses. Likewise, he reported 2,400 commuting miles and 21,264 business miles on his 2016 Form 2106-EZ. Petitioner did not report the travel

reimbursement received from his employer on Form 1040 for either of the years in issue.

In order to substantiate the purported business expenses reported on his tax returns, petitioner submitted into evidence three Excel spreadsheets entitled "Expenses 2015", "Expenses 2015 and 2016 Sears Credit Card", and "Expenses 2016". The spreadsheets roughly correspond to statements that petitioner submitted from JPMorgan Chase Bank, N.A., for October, November, and December of 2015 and all of tax year 2016 and from Sears MasterCard for April through September 2015 and October through December 2016.

IV. Notice of Deficiency

On September 4, 2018, respondent issued a notice of deficiency to petitioner for the years in issue. Respondent adjusted petitioner's filing status for each year from single to married filing separate. Respondent also disallowed certain of petitioner's claimed Schedule A itemized deductions including, as relevant here, the entirety of petitioner's claimed unreimbursed employee expense deductions totaling $26,969 for tax year 2015 and $31,372 for tax year 2016.

Respondent allowed Schedule A itemized deductions of $17,975 for tax year 2015 and $20,510 for tax year 2016, consisting of taxes, home mortgage interest, and charitable contributions for each year. For each of the years in issue

respondent allowed itemized deductions in an amount greater than the standard deduction.[5]

Discussion

I. Burden of Proof

In general, the Commissioner's determination set forth in a notice of deficiency is presumed correct, and a taxpayer bears the burden of proving that the determination is in error. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933). In certain circumstances, the burden of proof shifts to the Commissioner if the taxpayer introduces credible evidence with respect to any factual issues relevant to ascertaining the taxpayer's tax liability. Sec. 7491(a)(1). Because petitioner has not alleged or shown that section 7491(a) applies, the burden of proof remains on him.

II. Petitioner's Tax Return Filing Status

At trial petitioner testified that he was legally married under the laws of the State of his domicile, California, during the years in issue. He did not provide any evidence that he was legally separated from his spouse under a decree of divorce or separate maintenance, or otherwise qualified for a filing status other than

[5]The standard deduction for petitioner's adjusted filing status of married filing separate was $6,300 for both 2015 and 2016. See Rev. Proc. 2014-61, 2014-47 I.R.B. 860, 865; Rev. Proc. 2015-53, 2015-44 I.R.B. 615, 620.

married under section 7703. We conclude that respondent properly determined married filing separate status for petitioner. Accordingly, we hold that petitioner is not entitled to single status for the years in issue.

III. Unreimbursed Employee Business Expenses

Deductions are a matter of legislative grace, and a taxpayer bears the burden of proving that he is entitled to any deduction claimed. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934).

A taxpayer claiming a deduction on a Federal income tax return must demonstrate that the deduction is provided for by statute and must further substantiate that the expense to which the deduction relates has been paid or incurred. Sec. 6001; Hradesky v. Commissioner, 65 T.C. 87, 89-90 (1975), aff'd per curiam, 540 F.2d 821 (5th Cir. 1976); Meneguzzo v. Commissioner, 43 T.C. 824, 831-832 (1965); sec. 1.6001-1(a), Income Tax Regs. A taxpayer is required to maintain records sufficient to enable the Commissioner to determine his correct tax liability. Sec. 6001; sec. 1.6001-1(a), Income Tax Regs. Such records must substantiate both the amount and the purpose of the claimed deductions. Higbee v. Commissioner, 116 T.C. 438, 440 (2001).

Section 162(a) allows deductions for all ordinary and necessary business expenses paid or incurred during the taxable year in carrying on a trade or business. Boyd v. Commissioner, 122 T.C. 305, 313 (2004). Performing services as an employee constitutes a trade or business. Primuth v. Commissioner, 54 T.C. 374, 377-378 (1970).

In order to deduct employee business expenses, a taxpayer must not have received reimbursement, and must not have had the right to obtain reimbursement, from his employer. See Orvis v. Commissioner, 788 F.2d 1406, 1408 (9th Cir. 1986), aff'g T.C. Memo. 1984-533. The taxpayer bears the burden of proving that he is not entitled to reimbursement from his employer for such expenses. See Fountain v. Commissioner, 59 T.C. 696, 708 (1973). The taxpayer can prove that he was not entitled to reimbursement by showing, for example, that he was expected to bear these costs. See id.; see also Dunkelberger v. Commissioner, T.C. Memo. 1992-723 (finding that management team expected taxpayer to bear expense of business lunches with vendors).

When a taxpayer establishes that he has paid a deductible trade or business expense but is unable to adequately substantiate the amount, the Court may estimate the amount and allow a deduction to that extent. Cohan v. Commissioner, 39 F.2d 540, 543-544 (2d Cir. 1930). To apply the Cohan rule,

however, the Court must have a reasonable basis upon which to make an estimate. Vanicek v. Commissioner, 85 T.C. 731, 742-743 (1985).

Congress overrode the Cohan rule with section 274(d), which requires strict substantiation for certain categories of expenses; in the absence of evidence demonstrating the exact amounts of those expenses, deductions for them are to be disallowed entirely. Sanford v. Commissioner, 50 T.C. 823, 827-828 (1968), aff'd per curiam, 412 F.2d 201 (2d Cir. 1969). Expenses subject to section 274(d) include travel, meals, and lodging while away from home, entertainment, gifts, and "listed property", defined in section 280F(d)(4) to include passenger automobiles. Generally, deductions for meals and entertainment expenses are subject to the 50% limitation imposed by section 274(n). A taxpayer must substantiate by adequate records or by sufficient evidence corroborating his own statement the amount, time, place, and business purpose of these expenditures. Sec. 274(d); sec. 1.274-5T(c)(1), Temporary Income Tax Regs., 50 Fed. Reg. 46016 (Nov. 6, 1985).

Substantiation by adequate records requires the taxpayer to maintain an account book, a diary, a log, a statement of expense, trip sheets, or a similar record prepared contemporaneously with the expenditure and documentary evidence (e.g., receipts or bills paid) of certain expenditures. Sec. 1.274-5(c)(2)(iii), Income Tax Regs.; sec. 1.274-5T(c)(2), Temporary Income Tax Regs., 50 Fed. Reg. 46017

(Nov. 6, 1985). Substantiation by other sufficient evidence requires the production of corroborative evidence in support of the taxpayer's statement specifically detailing the required elements. Sec. 1.274-5T(c)(3), Temporary Income Tax Regs., 50 Fed. Reg. 46020 (Nov. 6, 1985).

Petitioner claimed Schedule A itemized deductions (before application of the 2% floor of section 67(a)) for unreimbursed employee business expenses totaling $26,969 for tax year 2015 and $31,372 for tax year 2016. Respondent disallowed the deductions in full. According to respondent, petitioner has failed to substantiate the reported expenses, prove that he was required to incur the expenses in the course of his employment, or prove that any expenses incurred were not reimbursable by his employer. Petitioner has offered various records in the form of credit card and bank account statements to substantiate the expenses. While he has cross-referenced some of these expenditures with spreadsheets he generated that list the dates and amounts of certain expenses, his records do not contain any contemporaneous indication of the business purpose for any given expenditure. Additionally, petitioner has failed to identify which, if any, of his reported business expenses were covered by the travel reimbursements he received from his employer for each of tax year 2015 and 2016 or to establish that he

requested and failed to receive reimbursement for the remaining expenses pursuant to Power Scaffold's reimbursement policy.

A. Vehicle, Parking, Fees, Toll, and Transportation Expenses

Petitioner reported $15,784 and $11,483 in vehicle expenses for tax years 2015 and 2016, respectively, on the basis of the standard mileage rate.[6] He reported an additional $11,483 in parking, fees, tolls, and transportation expenses for tax year 2016. These expenses are subject to the strict substantiation rules of section 274(d), and thus they cannot be estimated.

For expenses relating to passenger automobiles, a taxpayer must substantiate with adequate records or sufficient evidence corroborating his own statement: (1) the amount of each separate expense using either actual costs or the standard mileage rate; (2) the mileage for each business use of the passenger automobile and the total mileage for all purposes during the taxable period; (3) the date of the business use; and (4) the business purpose of the use. See sec. 1.274-5(j)(2), Income Tax Regs.; sec. 1.274-5T(b)(6), Temporary Income Tax Regs., 50 Fed. Reg. 46016 (Nov. 6, 1985).

[6]In lieu of substantiating actual passenger automobile expenses, a taxpayer may calculate them by using the standard mileage rate established by the Commissioner. See sec. 1.274-5(j)(2), Income Tax Regs.

It is unclear which, if any, of the vehicle and other auto-related expenses reported on petitioner's tax returns were covered by the $4,670 and $7,650 in travel reimbursements that petitioner received from his employer for tax years 2015 and 2016, respectively. Additionally, petitioner did not maintain a contemporaneous log of the miles he drove to any project site, the dates of the trips, or the business purpose of any given trip during the years in issue. Beyond credit card and bank statements showing payments for gas and vehicle repairs, petitioner did not provide any evidence to corroborate his testimony that the vehicle and other automobile expenses reported on his tax returns were incurred for business purposes. The statements in evidence are not sufficient to meet the strict substantiation requirements of section 274(d). Therefore, we conclude that petitioner has not established that he is entitled to deduct any amount of vehicle, parking, fees, toll, or transportation expenses for the years in issue.

B. Travel Expenses

Petitioner reported travel expenses of $2,600 for 2015 and $6,056 for 2016. To substantiate a portion of these expenses, petitioner submitted bank and credit card statements showing $2,343 in payments to hotels during the years in issue.

For expenses relating to lodging for travel away from home a taxpayer must substantiate with adequate records or sufficient evidence corroborating his own

statement: (1) the cost of the lodging, (2) the dates of departure and return for each trip away from home and the number of days away from home spent on business, (3) the name of the city or town or other similar destination, and (4) the business reason for travel or the nature of the business benefit derived or expected to be derived as a result of the travel. See sec. 1.274-5T(b)(1) and (2), Temporary Income Tax Regs., 50 Fed. Reg. 46014-46015 (Nov. 6, 1985).

Petitioner did not provide evidence to establish that the demands of his job required him to stay overnight in a hotel for any specific date that was not or could not have been reimbursed by his employer. See Orvis v. Commissioner, 788 F.2d at 1408. Additionally, petitioner's bank and credit card statements do not meet the strict substantiation requirements of section 274(d). Petitioner has not provided any other support for his reported travel expenses. Accordingly, we conclude that petitioner is not entitled to the claimed deduction for travel for either of the years in issue.

C. Meals and Entertainment Expenses

Petitioner reported meals and entertainment expenses of $1,800 for tax year 2016 (after reducing the amount by the 50% limitation imposed by section 274(n)). As noted above, meals and entertainment expenses are subject to the strict substantiation requirements of section 274(d) and may not be estimated.

Standing alone, petitioner's credit card and bank statements are insufficient to show that petitioner incurred any of the reported meals or entertainment expenses in connection with his employment. In addition, there is no evidence that any such expenses would not have been reimbursed by Power Scaffold. See Orvis v. Commissioner, 788 F.2d at 1408; Fountain v. Commissioner, 59 T.C. at 708. For these reasons, we conclude that petitioner is not entitled to deduct any amount of meals or entertainment expenses for tax year 2016.

D. Business and Other Expenses

The remaining unreimbursed employee expense items for consideration are the deductions claimed and identified by petitioner as "business expenses" of $2,765 for 2015, miscellaneous expenses totaling $5,820 for 2015, and union and professional dues of $550 for 2016. The 2015 miscellaneous expenses consist of $240 for union and professional dues, $2,501 for uniforms and protective clothing, $1,560 for laundry, $1,056 for cellular use, and $463 in cellular equipment.

Petitioner did not testify about or offer any evidence to support the $2,765 in "business expenses" he reported for tax year 2015. Similarly, although the record establishes that petitioner was a union employee, he did not offer testimony or submit any other evidence substantiating the payment of reported union dues for either of the years in issue. In order for us to estimate the amount of an

expense, we must have some basis upon which an estimate may be made. Vanicek v. Commissioner, 85 T.C. at 742-743. Given the lack of testimony and documentation regarding the 2015 business expenses and the union dues for the years in issue, we do not have a reasonable basis to estimate them. Consequently, we conclude that petitioner is not entitled to deduct business expenses or union dues for the years in issue.

We consider the remaining expenses separately.

1. Clothing, Laundry, and Tool Expenses

Petitioner reported $2,501 of uniform and protective clothing expenses and $1,560 of laundry expenses for tax year 2015. He did not report clothing or laundry expenses for 2016. His Excel spreadsheets and bank and credit card statements, however, reflect $499 and $916 in purchases from Home Depot during 2015 and 2016, respectively, and an additional $618 and $609 in purchases from various retailers for "supplies" in 2015 and 2016, respectively. At trial petitioner testified that these purchases were for protective clothing and tools that were necessary for his work. We consider these items together.

Expenses for clothing are deductible if the clothing is of a type specifically required as a condition of employment, is not adaptable to general use as ordinary clothing, and is not worn as ordinary clothing. Yeomans v. Commissioner, 30

T.C. 757, 767-769 (1958); Wasik v. Commissioner, T.C. Memo. 2007-148; Beckey v. Commissioner, T.C. Memo. 1994-514.

Petitioner credibly testified that he personally paid for steel-toed boots, leather gloves, and other personal protective equipment required for his position as a journeyman carpenter. He also credibly testified that he needed the items for safety reasons when working at project sites and that the boots and protective clothing were not suitable for or worn for general or personal wear.

While petitioner provided some evidence that might substantiate expenses for some of the items purchased, he failed to establish that he sought and was denied reimbursement for these items. There is no evidence that Power Scaffold would not have reimbursed him for his expenses for protective clothing and laundry services pursuant to the company's general reimbursement policy. See Orvis v. Commissioner, 788 F.2d at 1408; Fountain v. Commissioner, 59 T.C. at 708. Accordingly, we conclude that he is not entitled to deduct any amount of clothing or laundry expenses for the years in issue.

Although petitioner did not specifically claim any amount of unreimbursed employee expenses for tools on his tax returns for the years in issue, he credibly testified that he purchased and used personal tools in the course of his employment. He also testified that the amounts that he spent on those tools were

included with his personal protective clothing in the columns for "Home Depot" and "Supplies" on the Excel spreadsheets in evidence. As with the clothing purchases, however, petitioner failed to establish that he sought and was denied reimbursement for any tool purchases. There is no evidence that Power Scaffold would not have reimbursed him for any necessary tools pursuant to its general reimbursement policy. See Orvis v. Commissioner, 788 F.2d at 1408; Fountain v. Commissioner, 59 T.C. at 708. Accordingly, petitioner is not entitled deduct any expenses for tools for the tax years in issue.

2. Cellular Phone Use and Equipment

Petitioner reported expenses of $1,056 for cellular phone use and $463 for cellular phone equipment in tax year 2015. The record includes bank statements reflecting payments to Sprint wireless totaling $660 in 2015 and $1,591 in 2016.

Cellular phone service expenses are not subject to the strict substantiation requirements of section 274(d).[7] Therefore, pursuant to the Cohan rule, the amount of deductible expenses can be estimated by this Court provided we have a

[7]For taxable years beginning after December 31, 2009, cellular phones are no longer included in the definition of listed property under sec. 280F(d)(4), which was amended by the Small Business Jobs Act of 2010, Pub. L. No. 111-240, sec. 2043(a), 124 Stat. at 2560. As a result of this amendment, deductions for cellular phone service expenses during the years in issue are not subject to the strict substantiation rules of sec. 274(d).

reasonable basis for making an estimate of the amount of the expenses related to business use. See Vanicek v. Commissioner, 85 T.C. at 742-743 (finding that estimate must have reasonable evidentiary basis).

Petitioner did not testify regarding his cellular phone service or equipment expenses, and he did not give an estimate of his business versus personal use. Without such evidence, the Court does not have a reasonable basis to estimate the amounts of the expenses related to business use. Furthermore, the record reflects that Power Scaffold reimbursed its employees for expenses incurred in the course of their employment. There is no evidence that any business use of petitioner's cellular phone would not have been reimbursable. See Orvis v. Commissioner, 788 F.2d at 1408; Fountain v. Commissioner, 59 T.C. at 708. Accordingly, we hold that petitioner is not entitled to deduct unreimbursed employee expenses for cellular phone service and cellular phone equipment for the years in issue.

IV. Conclusion

In reaching our holdings herein, we have considered all arguments made by the parties, and to the extent not mentioned above, we find them to be moot, irrelevant, or without merit.

To reflect the foregoing conclusions and respondent's concessions,

Decision will be entered under Rule 155.