IN THE MAGISTRATE DIVISION

OF THE OREGON TAX COURT

Small Claims

Income Tax

SALLY K. GALLAGHER, Plaintiff, v. DEPARTMENT OF REVENUE, STATE OF OREGON, Defendant.	))))))))))	No. 991033C **DECISION AND JUDGMENT**

Plaintiff has appealed from a conference decision issued by the Oregon Department of Revenue (department) upholding adjustments to her 1995 return disallowing certain expenses deducted in connection with a trip to Syria. A trial was held by telephone January 12, 2000.

Plaintiff appeared *pro se* and testified on her own behalf. Defendant appeared through Amy Stalnaker, an auditor with the department.

The parties agree that the conference letter issued by the department on June 8, 1999 (Ptf's Complaint at 2), correctly reflects the facts and the respective positions of the parties. Little additional information was presented at trial.

STATEMENT OF FACTS

The facts are not in dispute. Plaintiff received a Fulbright Research award to conduct research in Syria on family and family change. The award totaled $22,245, and included money for plaintiff's husband and child. According to the conference officer's

decision, which the parties agree is accurate factually and to be used by the court in deciding the case:

> "Syria is a patriarchal society in which women simply do not travel alone. Having [plaintiff's] husband and son with [her] legitimized [plaintiff] in the neighborhood as a respectable married woman, and gained [her] access to men and women in that society that would not otherwise have been possible. In short, [plaintiff's] spouse and son were critical to the success of [plaintiff's] research." (Ptf's Complaint at 2).

Plaintiff's son was 5 or 6 years old at the time of the trip. Plaintiff testified that he provided her access to children.

ISSUE

The issue in this case is whether plaintiff may deduct as a travel expense the costs associated with her spouse and child accompanying her to Syria.

COURT'S ANALYSIS

For purposes of measuring taxable income, the Oregon legislature has made Oregon's personal income tax law identical to the federal Internal Revenue Code (Code). ORS 316.007.

The relevant Code provision is section 212, which provides:

> "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year -
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> "(1) for the production or collection of income; * * *"

The parties agree that plaintiff's own expenses are deductible.[1] Section 274(m)(3) of the

[1] The parties presented the case as involving section 212 nonbusiness expense deductions. The costs may not be deducted under section 162 because plaintiff was not engaged in a trade or business.

Code pertains to the deductibility of travel expenses of a spouse or dependent under that chapter, and reads:

> "No deduction shall be allowed under this chapter * * * for travel expenses paid or incurred with respect to a spouse, dependent, or other individual accompanying the taxpayer * * * on business travel, unless -
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> "(A) the spouse, dependent, or other individual is an employee of the taxpayer,
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> "(B) the travel of the spouse, dependent, or other individual is for a bona fide business purpose, and
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> "(C) such expenses would otherwise be deductible by the spouse, dependent, or other individual."

Deductions are a matter of legislative grace. *DeArmond v. Dept. of Rev.*, 14 OTR 112, 118 (1997); *In Re McKinnon's Estate*, 212 Or 213, 223, 319 P2d 579, 584 (1957). As such, they are to be strictly construed against the taxpayer. *In Re McKinnon*, 212 Or at 223 (citations omitted); *Keller v. Dept. of Rev.*, 12 OTR 381, 385 (1993). Taxpayers have the burden of demonstrating that they come within the exemption. *Id*.

Section 274(m)(3) of the Code was enacted by Congress in 1993.[2] It is a disallowance provision. Prior to its enactment, the expenses at issue would have been deductible if the presence of plaintiff's husband and son served a bona fide business purpose (i.e., they were ordinary and necessary for the production of income).[3] By enacting section 274, Congress consciously limited the deductibility of the costs of a

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[2] Revenue Reconciliation Act of 1993, section 13272(a), amending Code section 274(m) by adding paragraph (3). The amendment became effective after December 31, 1993.

[3] The court offers no opinion on that issue because section 274(m)(3) of the Code redefines the inquiry.

spouse or dependent accompanying a taxpayer on a business trip.

The parties have framed the issue as whether plaintiff's husband and son were "employees" of plaintiff as provided in paragraph (A) of section 274(m)(3). Neither the Code nor Treasury regulations define the word employee for purposes of that section. Moreover, the parties did not present any case law on the issue and the court was unable on its own to find a single instance in which any judicial or quasi-judicial body cited Code section 274(m)(3), with or without specific reference to paragraph (A).

The determination of whether plaintiff's husband and son were employees is a question of fact. *Professional & Executive Leasing, Inc. v. Commissioner*, 89 TC 225, 232 (1987), *aff'd* 862 F2d 751 (9th Cir 1988); *Air Terminal Cab, Inc. v. United States*, 478 F2d 575, 578 (8th Cir 1973). Certain factors are commonly considered by courts in making the determination of whether an employment relationship exists. The United States Tax Court listed the following as relevant factors: "(1) [t]he degree of control exercised by the principal over the details of the work; (2) which party invests in the facilities used in the work; (3) the opportunity of the individual for profit or loss; (4) whether or not the principal has the right to discharge the individual; (5) whether the work is part of the principal's regular business; (6) the permanency of the relationship; and (7) the relationship the parties believe they are creating." *Weber v. Commissioner*, 103 TC 378, 387 (1994) (citations omitted). No one factor controls. *Id*. Crucial to the determination is the right to control. *Matthews v. Commissioner*, 92 TC 351, 361

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(1989); Am Jur 2d, EMP REL § 1.[4]

A more concise definition of employee is "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Black's Law Dictionary*, 543 (7th ed 1999).

The court accepts that the presence of plaintiff's husband was necessary, although the evidence is somewhat equivocal. The facts are less clear as to her son, who was only five or six years old at the time of the trip. Nonetheless, necessity is no longer the test. The change in the law brought about by Code section 274(m)(3) added additional requirements to the deductibility of these expenses, including that the spouse or other individual be an employee and there is no evidence in this case of an employer-employee relationship.

Plaintiff did not interview and hire her spouse and child. They were not paid, nor does it appear they had any specified duties, express or implied. There is no evidence regarding the degree of control, if any, that plaintiff exercised over the two. They apparently accompanied plaintiff, at least on some occasions, when she went about her business of meeting with local Syrians for her research, but no specific information about

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[4] Determination of whether an employment relationship exists focuses on the "employer's right to control the employee's conduct [as] the key element" and includes the following additional considerations: * [t]he alleged employer's selection and hiring of the alleged employee *[t]he parties' intent, as expressed in a contract as to the type of relationship that would exist between them * [t]he payment of wages and the method of payment * [t]he provision of fringe benefits by the alleged employer * [t]he alleged employer's deduction, withholding, or payment of taxes based on compensation for work performed * [t]he source of the materials and equipment used by a worker * [t]he degree of skill involved in the work * [t]he duration of the worker's service * [w]hether the worker's efforts further the purported employer's business, rather than an independent enterprise of the worker[.]" Am Jur 2d, EMP REL § 1.

those activities was provided. In fact, the evidence shows only that plaintiff's "husband and son * * * legitimized [plaintiff] in the neighborhood as a respectable married woman, and gained [her] access to men and women in that society that would not otherwise have been possible." (Ptf's Complaint at 2). Presence alone does not equate with employment. Likewise, there is no evidence as to the relationship the parties believed they were creating in contemplation of the research trip.

Plaintiff contends the two received payment "in-kind" in that her grant was increased because of their presence and she supported both husband and child while overseas. Payment, either actual or in-kind, however, is not critical and support is irrelevant. Many taxpayers have supported a spouse on a business trip but been denied a deduction for the associated expenses. Moreover, plaintiff argues the two worked for her, or made her effort possible, and without them she could not have conducted her research. In short, they were indispensable to the success of the mission. As stated earlier, necessity is not the determinative factor.

This case presents a difficult question because of the nature of plaintiff's undertaking and its location. The court does not doubt that plaintiff was better able to move about in Syria with a man at her side. Her husband's presence apparently legitimized plaintiff's status in a country where women are viewed in a lesser, or at least "different", light than men. According to the conference officer's decision, "Syria is a patriarchal society in which women simply do not travel alone." *Id*. As stated earlier, all of this simply points to the necessity of plaintiff's husband's presence. While it is likely that certain interactions would not have taken place without her husband being with her,

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it is not clear whether any services were rendered by him which would bring him within the definition of "employee".

An instructive discourse on the employer-employee relationship appears in *Jylha v. Chamberlain*, 168 Or 171, 121 P2d 928 (1942), where the Oregon Supreme Court stated:

> "In a general sense, an employee is one who renders service for another for wages or salary. Shields v. W. R. Grace & Co., 91 Or. 187, 179 P 265; Helliwell v. Sweitzer, 278 Ill. 248, 115 N.E. 810. The relationship of employer and employee, or master and servant, is not created merely because service is rendered by a volunteer, but arises from a contract of hire, express or implied. True, the compensation need not be stated. Houston v. Keats Auto Co., 85 Or. 125, 166 P. 531. It is possible for the relationship of employer and employee to exist without [168 Or 176] any compensation promised or expected for the services rendered (25 Am Jur. 453; 39 C.J. 36) but as a general rule employment connotes a promise, express or implied, to pay for work performed: Labatt's Master & Servant, 2d Ed., Vol. 1, § 19. It is said that the test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work. 35 Am Jur 446." *Id* at 175-176.

While *Jylha* concerned the definition of employee in the Employers' Liability Act, the court considered the word "in its ordinary acceptation and meaning." *Id*, 168 Or at 175.[5] This language further supports the court's conclusion that plaintiff's husband and child were not her employees while plaintiff worked in Syria.

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[5] The court stated that "[t]he purpose and object of the Employers' Liability Act is to protect and safeguard employees engaged in certain kinds of work embraced within the act which involve a risk or danger." *Jylha v Chamberlain*, 168 Or 171, 175, 121 P2d 928 (1942).

CONCLUSION

Based on the foregoing, the court concludes that plaintiff's husband and son were not employed by plaintiff during her overseas trip to Syria in 1995, as required by Code section 274(m)(3)(A). Accordingly, the expenses associated with their travel are not deductible under section 212.

IT IS THE DECISION OF THE COURT that defendant's adjustments to plaintiff's 1995 state tax return disallowing the expenses that pertain to plaintiff's husband and son accompanying her to Syria for research are upheld.

IT IS HEREBY ADJUDGED AND DECREED that the relief requested by plaintiff is denied.

Dated this _____ day of March, 2000.

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DAN ROBINSON
MAGISTRATE

THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON MARCH 31, 2000. THE COURT FILED THIS DOCUMENT ON MARCH 31, 2000.