OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18093849
RICHARD RESLER AND CATHY RESLER	) Date Issued: June 19, 2019

OPINION

Representing the Parties:

For Appellants: Richard Resler and Cathy Resler

For Respondent: Anne Mazur, Specialist

For Office of Tax Appeals (OTA): Ellen L. Swain, Tax Counsel

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Richard Resler and Cathy Resler (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax, penalties and interest for their 2012, 2013 and 2014 tax years.

Appellants waived their right to an oral hearing; therefore, the matter is being decided based upon the written record.

ISSUE

Whether appellants have demonstrated error in FTB's proposed assessments, which are based on final federal determinations.

FACTUAL FINDINGS

1. Appellants filed California Nonresident or Part-Year Resident Income Tax Returns for 2012, 2013, and 2014. These returns are largely based upon the income and deductions reported on their federal income tax returns for those same years.
2. The Internal Revenue Service (IRS) audited appellants' federal income tax returns for years 2012, 2013, and 2014. The audit resulted in the IRS adjusting appellants' income

and deductions for those years, determining tax deficiencies and imposing accuracy-related penalties for negligence.

3. The federal adjustments became final federal assessments. There is no evidence that the IRS cancelled or reduced its assessments. Appellants did not notify FTB of the federal adjustments to their income.

4. The IRS notified FTB of the federal adjustments on July 12, 2016. Based on the information contained in the IRS notification, FTB issued timely Notices of Proposed Assessment (NPAs) to appellants for 2012, 2013, and 2014 on November 13, 2017.

5. FTB's NPA for 2012 proposed $66,167 of income adjustments: reducing Schedule E real estate loss after passive limitations by $7,425; disallowing moving expenses of $17,350; disallowing miscellaneous deductions of $44,105 (primarily claimed unreimbursed employee business expenses) and other itemized deductions of $4,969; and allowing the standard deduction of $7,682. Based on these adjustments, the NPA proposed to assess additional tax of $1,882, an accuracy-related penalty for negligence of $376.40, and interest.

6. FTB's NPA for 2013 proposed $94,094 of income adjustments: disallowing student loan interest of $1,585; disallowing moving expenses of $12,759; increasing Schedule C gross receipts or sales by $30,934; reducing Schedule E real estate loss after passive limitations by $21,394; disallowing miscellaneous deductions of $30,322; disallowing remaining itemized deductions of $7,098; allowing the standard deduction of $7,812 and a subtraction for self-employment tax of $2,186. Based on these adjustments, the NPA proposed to assess additional tax of $3,301, an accuracy-related penalty for negligence of $660.20, and interest.

7. FTB's NPA for 2014 proposed $84,139 of income adjustments: disallowing moving expenses of $6,304; reducing Schedule E real estate loss after passive limitations by $13,182; disallowing a medical expense deduction of $3,711; disallowing miscellaneous deductions of $30,942; and adding $30,000 of income from pensions and annuities. Based on these adjustments, the NPA proposed to assess additional tax of $736, an accuracy-related penalty for negligence of $147.20, and interest.

8. Appellants protested the NPAs. FTB denied their protest and issued Notices of Action (NOAs) affirming their NPAs on August 13, 2018. Appellants timely filed this appeal from the NOAs.

9. In their appeal, appellants allege that they did not participate in the IRS audit and "did not get to show proof of our deductions." Appellants state that they "have hired Optima Tax Relief to get [an IRS] Audit reconsideration." Appellants attached to their appeal a letter from Optima Tax Relief [Optima] that they contend "confirms this statement." The letter from Optima states that Optima has been retained by appellants "to resolve their tax matters before the Internal Revenue Service." However, the only years Optima references in its letter are appellants' 2015 and 2016 tax years (whereas the years at issue in this appeal are years 2012-2014).

10. Appellants also allege in their appeal letter that appellant-husband was a travelling electrician working out of his home state of Florida and that, as such, he was legally able to deduct his "working expenses." Appellants have not, however, produced any evidence substantiating those expenses. Appellants' appeal letter states:

> The problem was that I took moving expenses as a deduction[]. Since I am not allowed to take moving expenses off then I was Audited [by the IRS] and they disallowed all my deductions. I asked Optima to get them to at least let me take the standard deduction for working expenses found on the federal website for taking these deductions. This site is located at www.gsa.gov/travel/plan-book/per-diem-rates. From this website you can enter the state where you worked and the time you worked to see the amount of per-diem that can be taken off the income each day for work expenses. . . . Please postpone your decision to assess taxes until after the Internal Revenue Service has answered our plea to reconsider this Audit.

11. FTB's opening brief included IRS transcripts of account for appellants' 2012-2014 years, dated November 9, 2018, which reveal that the IRS has not changed its audit determinations for those years, nor initiated an audit reconsideration.

DISCUSSION

A taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. (R&TC, § 18622(a).) A proposed deficiency assessment (whether it be of tax or penalties) that is based on a federal audit is presumptively correct and the taxpayer bears the burden of proving otherwise. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Brockett*

(86-SBE-109) 1986 WL 22731; *Appeal of Abney* (82-SBE-104) 1982 WL 11781 [accuracy-related penalty].) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

When a proposed FTB assessment is based on a final federal adjustment, taxpayers can satisfy their burden of proof in one of two ways. They can either show that the IRS has changed or eliminated its adjustments, or they can produce evidence that the IRS's adjustment and/or the FTB's adjustments based thereon are incorrect or inapplicable.

Appellants have not shown that the IRS changed or eliminated its adjustments. Although appellants allege that they retained Optima to obtain audit reconsideration from the IRS, the letter from Optima references years *subsequent to* the years at issue, and the IRS transcripts do not indicate that an audit reconsideration is underway. Appellants produced no correspondence whatsoever between Optima and the IRS relating to the years at issue. Of course, if the IRS eventually does reconsider *and change* its audit determination for the years at issue, the law permits appellants to notify FTB at the time of the federal changes and request that FTB make corresponding state changes. (See R&TC, §§ 18622, 19311.)

Appellants also have not shown that the FTB's adjustments premised on the federal adjustments were incorrect. Appellants' allegation that appellant-husband should be able to deduct his "working expenses" based on the per diem amount the federal government allows to its employees is not sufficient to satisfy appellants' burden of proof. Appellants have not shown the amount of appellant-husband's business travel, and they have not satisfied the substantiation requirements for deducting travel expenses under Internal Revenue Code (IRC) section 274 and the regulations thereunder. (See generally IRS Revenue Procedure 2011-47; Treas. Reg. § 1.274-5T(b)(2)(i) & (c).) It is not enough for appellants to simply allege that they are entitled to claim a per diem rate for travel—they must establish by adequate proof that the nature and amount of their business-related travel and, where applicable, satisfy the substantiation requirements of IRC § 274. This they have failed to do. Moreover, appellants have raised no substantive arguments contesting the other adjustments made by the IRS which were incorporated into the FTB's NPAs (i.e., the unreported pension/annuity income, the additional Schedule C gross receipts, the reductions of Schedule E real estate losses after passive limitations, and the substantial understatement penalty for negligence).

HOLDING

Appellants have not demonstrated error in the FTB's proposed assessments.

DISPOSITION

FTB's action is sustained in full.

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Jeffrey Margolis
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Jeffrey I. Margolis
Administrative Law Judge

We concur:

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge