

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18042790  
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**CAROLYN C. ROWDEN** ) Date Issued: September 26, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Vidal S. Lopez, Certified Public Accountant

For Respondent: Brian Werking, Tax Counsel

For the Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Carolyn C. Rowden (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s protest of a proposed assessment for \$2,697.00 in additional tax, an accuracy-related penalty of \$539.40 and interest, for the 2012 tax year.

Appellant waived her right to an oral hearing, and therefore, we decide this matter based on the written record.

**ISSUE**

Whether appellant has established that she is entitled to a mortgage interest deduction of \$26,805 for the 2012 tax year.

**FACTUAL FINDINGS**

1. During the 2012 tax year, appellant lived and worked in California.
2. U.S. Bank issued to appellant and her husband a Form 1098 (*Mortgage Interest Statement*) indicating that it had received \$26,804.76 in mortgage interest on an outstanding principal balance of \$631,728.47 for the 2012 tax year.

3. The \$26,804.76 of mortgage interest was paid to U.S. Bank via checks drawn from an account held in appellant's name.
4. Appellant filed a 2012 U.S. Individual Income Tax Return using the married filing separately filing status, in which she claimed an itemized deduction for home mortgage interest of \$29,305.
5. Appellant filed a 2012 California Resident Income Tax Return using the married filing separately filing status, in which she claimed an itemized deduction for home mortgage interest of \$29,305.
6. The Internal Revenue Service (IRS) subsequently audited appellant's 2012 federal return, which resulted in the disallowance of her claimed mortgage interest deduction and the imposition of an accuracy-related penalty of \$1,548.
7. Following the IRS determination, FTB issued to appellant a Notice of Proposed Assessment (NPA) disallowing appellant's mortgage interest deduction and imposing an accuracy-related penalty of \$539.40.
8. Appellant protested the NPA, and in response, FTB issued a Notice of Action denying appellant's protest.
9. On appeal, FTB determined that the funds used to pay the \$26,804.76 in mortgage interest to U.S. Bank were community property, and as such, appellant had a one-half interest in those payments entitling her to a mortgage interest deduction in that amount. This reduced the proposed additional tax from \$2,679 to \$1,479. FTB also determined that the reduction in additional tax means that the accuracy-related penalty should no longer be imposed.

### DISCUSSION

Income tax deductions are a matter of legislative grace, and taxpayers bear the burden of proving that they are entitled to the deductions that they claim. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440.) To carry their burden of proof, taxpayers must point to an applicable statute and show by credible evidence that the deductions they claim come within its terms. (*Appeal of Telles*, 86-SBE-061 1986 WL 22792.) The burden of proof is by a "preponderance of the evidence." (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances he or she asserts are more likely than not to be correct. (*Concrete Pipe and*

*Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow*, (82-SBE-274) 1982 WL 11930.)

California conforms to federal income tax law regarding the deductibility of mortgage interest. (See R&TC, § 17201.) For the 2012 tax year, married individuals filing separately may deduct interest paid or accrued during the tax year on debt of up to \$500,000 which is secured by a qualified residence and incurred to purchase, construct, or substantially improve that residence (acquisition indebtedness). (Int.Rev. Code, § 163(h)(2) – (3).) A qualified residence means the principal residence of the taxpayer and one other residence of the taxpayer. (Int.Rev. Code, § 163(h)(4).)

Appellant contends that, as a married person filing separately, she is entitled to deduct the entirety of the mortgage interest paid to U.S. Bank because those payments were made from her separate property, as evidenced by checks issued from an account held solely in her name. However, for the reasons explained below, the character of the funds in this account cannot be reliably ascertained merely by looking to the individuals listed on this account.

It is well-established that the marital property interest of a spouse relating to property acquired during the marriage, is governed by the laws of the acquiring spouse's domicile. (*Schechter v. Superior Ct.* (1957) 49 Cal.2d 3, 10.) “Domicile” is defined as the location where a person has the most settled and permanent connection, and the place to which a person intends to return when absent. (*Whittell v. Franchise Tax Board* (1964) 231 Cal.App.2d 278, 284; Cal. Code Regs., tit. 18, § 17014(c).) As the account from which the mortgage interest was paid is in appellant’s name (i.e., appellant was the acquiring spouse), we look to appellant’s domicile in determining the character of the funds in this account.

Appellant does not contend and there is no evidence indicating that she was domiciled in another state during the 2012 tax year. Rather, the available evidence shows that appellant’s connections were solely to California – she lived and worked in this state and filed a California Resident Income Tax Return.<sup>1</sup> Based on these facts, we conclude that appellant was domiciled in California for the 2012 tax year.

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<sup>1</sup> A California resident is an individual who is present in California for other than a temporary or transitory basis, or domiciled in California, but outside the state for a temporary or transitory basis. (R&TC, § 17014(a).)

California is a community property state, meaning that appellant's domicile in California subjects her to the presumption that all property acquired by appellant during the marriage, including the funds deposited into the account from which the mortgage interest was paid, is community property. (Cal. Fam. Code, § 760.) That this account was held solely in appellant's name is insufficient to demonstrate that it was her separate property. (See Cal. Fam. Code, § 852(a) [stating that a transmutation of real or personal property is not valid unless made in writing by an express declaration that is accepted by the spouse whose interest in the property is adversely affected].) Therefore, because spouses are deemed to have a co-equal interest in community property (Cal. Fam. Code, § 751), it is presumed that appellant's husband had a half-interest in the mortgage interest payments to U.S. Bank made from this account.

Appellant has not provided any evidence indicating that the funds in this account were acquired prior to marriage, were transmuted to separate property, or were otherwise her separate property by operation of law. And a taxpayer's failure to produce evidence that is within her control gives rise to a presumption that such evidence is unfavorable to her case. (*Appeal of Don A. Cookston*, (83-SBE-048) 1983 WL 15434.)

Appellant's remaining few contentions have no bearing on FTB's partial disallowance of her mortgage interest deduction, and as such, we consider them to be irrelevant.<sup>2</sup>

Finally, appellant, as a married individual filing separately, is limited to a mortgage interest deduction on acquisition indebtedness not to exceed \$500,000. Appellant's outstanding principal balance was well over this amount, and for this reason alone she would not be entitled to deduct all the mortgage interest paid to U.S. Bank.

#### HOLDING

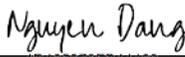
Appellant has not established that she is entitled to a mortgage interest deduction of \$26,805 for the 2012 tax year.

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<sup>2</sup> Appellant contends that she is a joint owner of the mortgaged property, that it is her principal residence, and she has a legal liability to make the mortgage payments.

DISPOSITION

In accordance with FTB's concession on appeal, its action denying appellant's appeal of the proposed assessment is modified to reduce the amount of additional tax from \$2,697.00 to \$1,479.00 and to delete the accuracy-related penalty of \$539.40. Otherwise, FTB's action is sustained.

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Nguyen Dang  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Linda C. Cheng  
Administrative Law Judge

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Neil Robinson  
Administrative Law Judge