

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
MONIQUE RENARD PIERCE, ) OTA NO. 18010967  
 )  
 APPELLANT. )  
 )  
 )

## TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Monday, November 18, 2019

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
400 R Street, Sacramento, California, 95811,  
commencing at 10:00 a.m. and concluding  
at 10:27 a.m. on Monday, November 18, 2019,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

1 APPEARANCES:  
2  
3 Panel Lead: ALJ ALBERTO ROSAS  
4  
5 Panel Members: ALJ TOMMY LUENG  
6 ALJ SARA HOSEY  
7  
8 For the Appellant: MONIQUE PIERCE  
9 MELISSA GONZALEZ  
10  
11 For the Respondent: STATE OF CALIFORNIA  
12 FRANCHISE TAX BOARD  
13 By: BRIAN MILLER  
14 SONIA WOODRUFF  
15  
16 TAX COUNSEL  
17 Legal Division  
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I N D E X

OPENING STATEMENT

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E X H I B I T S

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1           Sacramento, California; Monday, November 18, 2019

2                               10:00 a.m.

3

4           JUDGE ROSAS: We're on the record in the matter  
5 of the appeal Monique Renard Pierce, OTA Case  
6 Number 18010967. This hearing is taking place in  
7 Sacramento, California, November 18, 2019. The time is  
8 approximately 10:00 a.m.

9           The panel of administrative law judges consist of  
10 Tommy Lueng.

11           JUDGE LEUNG: Good morning.

12           JUDGE ROSAS: Sara Hosey.

13           JUDGE HOSEY: Good morning.

14           JUDGE ROSAS: And me, Alberto Rosas. And  
15 although I may be the lead administrative law judge for  
16 purposes of conducting this hearing, please note that the  
17 three of us, this panel, we are all equal participants and  
18 equal decision makers.

19           At this time I would ask each of you to please  
20 state your name for the record. We are going to start  
21 with my far left.

22           MS. PIERCE: Monique Renard Pierce.

23           MS. GONZALEZ: Melissa Gonzalez, representative  
24 for Monique Renard Pierce.

25           MR. MILLER: Brian Miller for Franchise Tax

1 Board.

2 MS. WOODRUFF: And Sonia Woodruff for Franchise  
3 Tax Board.

4 JUDGE ROSAS: This hearing is being recorded. We  
5 do have a stenographer, so I'd just like to remind each of  
6 you to please speak slowly, speak clearly, and please  
7 speak one at a time.

8 We did have your telephonic prehearing conference  
9 on October 30th, which resulted in my issuance of five  
10 orders. I was going to go over those orders. Number one,  
11 Appellant's Exhibits 1 through 8 were admitted into  
12 evidence without objection. Appellant's Exhibits -- I'm  
13 sorry. Appellant's Exhibit 9 was not admitted into  
14 evidence. Number 3, Respondent's Exhibits A through --  
15 that's Alpha through Hotel -- were admitted into evidence  
16 without objection.

17 Number four, we agreed that only one witness,  
18 Ms. Pierce, would testify in today's oral hearing. And,  
19 lastly, we also agreed that the parties would comply to  
20 specific time limits, and we estimated that today's  
21 hearing should take no more than one hour.

22 Ms. Gonzalez, is this an accurate summary of  
23 prehearing conference orders?

24 MS. GONZALEZ: Yes.

25 JUDGE ROSAS: Mr. Miller?

1 MR. MILLER: Yes, it is.  
2 (Appellant's Exhibits 1-8 were received  
3 in evidence by the administrative Law Judge.)  
4 (Department's Exhibits A-H were received in  
5 evidence by the Administrative Law Judge.)  
6 JUDGE ROSAS: At this point, we will begin with  
7 opening statements. Ms. Gonzalez, you have up to five  
8 minutes, and you may begin whenever you're ready.  
9 MS. GONZALEZ: Thank you.

10

11 OPENING STATEMENT

12 MS. GONZALEZ: We're here today to appeal to the  
13 Franchise Tax Board and the position of an additional tax  
14 of \$3,359 on Ms. Pierce's 2015 tax returns.

15 In 2012 Ms. Pierce worked as a sales  
16 representative for McCarthy Building Corporation.  
17 Ms. Pierce did not work at the corporate office. She  
18 worked at a small subdivision of the corporate office in  
19 Roseville, California. Her duties as a sales  
20 representative included traveling to meet with potential  
21 clients and -- and eating with them with the hope of  
22 securing business contracts.

23 This was a standard practice of sales associates,  
24 and Ms. Pierce traveled to meet with clients to meet  
25 with -- to secure construction contracts was what all

1 sales representatives practiced in their capacity as sales  
2 representatives. Both the Franchise Tax Board and  
3 Ms. Pierce agree that the reimbursement policy of McCarthy  
4 Corporation was to reimburse for all business-related  
5 expenses related to the acquisition of construction  
6 contracts.

7           However, as Ms. Pierce has stated and will  
8 testify today under oath, the Roseville office practice of  
9 reimbursement was not consistent with corporate policy.  
10 Instead, the Roseville office only reimbursed for travel  
11 expenses that related to construction contracts.

12           The two issues in this case, one is whether  
13 Ms. Pierce can establish an allowable unreimbursed  
14 employee expense deduction; and two, whether she can  
15 substantiate those amounts. With respect to the  
16 establishment, Revenue and Taxation Code 17021 permits  
17 employees to deduct business expenses that are ordinary  
18 and necessary to her employment and that are directly  
19 related to or pertain to the employment.

20           Ms. Pierce's duties included traveling to meet  
21 with the clients to incur -- and she would incur travel  
22 and meal expenses. Therefore, these expenses were in the  
23 ordinary course of her employment and were necessary as a  
24 precursor to the ultimate hopes of securing construction  
25 contracts.



1           With regards to the substantiation of the  
2           amounts, Internal Revenue Code 274(d) requires employees  
3           to substantiate their business expenses that directly  
4           relate to or pertain to employment. Ms. Pierce has the  
5           burden to substantiate these expenses, either through  
6           adequate records or sufficient evidence. Ms. Pierce's  
7           original receipts that she used to file her 2012 tax  
8           returns were inadvertently lost two years after she filed  
9           her tax.

10           And so in response to the Franchise Tax Board's  
11           request for information to substantiate -- establish to  
12           substantiate her amounts, she provided credit card  
13           statements in Exhibit 4 and her calendar and also compiled  
14           a table of calculations. And this evidence includes the  
15           amounts claimed as deductions, descriptions of the amounts  
16           for the business purpose of securing construction  
17           contracts. And she has established the business  
18           relationship as the taxpayer to the person or entity that  
19           receives the benefit of the travel expenses, in this case  
20           being McCarthy. McCarthy benefits from the travel  
21           expenses that she's claimed.

22           JUDGE ROSAS: Ms. Gonzalez, you have  
23           approximately 30 seconds. So you can begin wrapping up  
24           your opening statement.

25           MS. GONZALEZ: Yes. I have concluded my opening

1 statement. I'm ready for Ms. Pierce to be sworn in.

2 JUDGE ROSAS: Thank you. We'll get to that  
3 momentarily.

4 At this moment, Mr. Miller, would you like to  
5 begin with your opening statement?

6 MR. MILLER: Yes.

7

8 OPENING STATEMENT

9 MR. MILLER: The evidence will show that  
10 Appellant did not request available reimbursement from her  
11 then-employer. For this reason alone, she's not entitled  
12 to deduct her claimed unreimbursed employee expenses.  
13 Appellant contends in her briefs that she did not seek  
14 reimbursement because she thought her office may close or  
15 she could, otherwise, lose her job.

16 However, under California law, employee concern  
17 with an employer's financial condition or even her  
18 employment security, does not excuse the legal requirement  
19 to seek reimbursement available from the employer. Simply  
20 put, Appellant did not seek available reimbursement, is  
21 not entitled to deduct her claimed expenses as  
22 unreimbursed employee expenses.

23 This concludes my opening, Your Honor.

24 JUDGE ROSAS: Thank you, Mr. Miller.

25 At this time we're going to begin with witness

1 testimony. Ms. Pierce, if you wouldn't mind taking a seat  
2 in the witness box. And, actually, before you sit down in  
3 the witness box, just remain standing. Our Stenographer  
4 will administer the witness oath. Thank you.

5

6

MONIQUE RENARD PIERCE,

7 produced as a witness, and having been first duly sworn by  
8 the Administrative Law Judge, was examined and testified  
9 as follows:

10

11 THE WITNESS: Good morning.

12 JUDGE ROSAS: Good morning, Ms. Pierce.

13 THE WITNESS: So I'm going to write -- pretty  
14 much read off what we had submit, and then if there's any  
15 questions --

16 So in 2012 I was one of three sales  
17 representatives working out of the Northern California  
18 Roseville office for McCarthy. The Roseville office was a  
19 small division of McCarthy Incorporated, which  
20 consistently struggled to stay profitable. During the  
21 leaner years we struggled to keep the office open, and it  
22 was common practice in that climate not to submit expenses  
23 for failed pursuits in order to keep the overhead low.

24 We did not discuss this practice with each other  
25 or with the management, and it was something we adhered to

1 despite the corporate reimbursement policy stated. And I  
2 should explain that we were an employee of the business.  
3 So everybody had a stake in the company making it  
4 profitable. And we knew on a semiannual basis how our  
5 office was doing in terms of our contributions to the  
6 corporate bottom line.

7           So it was very much an environment of keeping  
8 your division or your office profitable in order to help  
9 the company along. And there were offices that had been  
10 closed because of job losses or overhead. So my goal was  
11 to do my job and to blend in with the Roseville office  
12 culture. I was driven by my desire for our office to  
13 remain open so that I could keep doing my job.

14           Sales representatives were reasonably paid, so we  
15 absorbed the business expenses related to dead-end  
16 pursuits in order to keep the profit margin as to the  
17 Roseville office as high as possible. I acquiesced to  
18 this business practice because I was not interested in  
19 changing the work culture but, rather, to work in bringing  
20 in clients and projects and also to keep my position.

21           And my supervisor never asked me to submit  
22 reimbursement requests for any dead-end pursuits. That  
23 was really -- we weren't reimbursed for projects or for  
24 cost that we could -- project costs, so it wouldn't come  
25 off of our overhead, but a client would pay for our hours,

1     our driving, and our traveling.

2             As a result, of the Respondent's audit for my  
3     2012 tax return -- I did attempt to locate my fellow sales  
4     representatives to corroborate my story but,  
5     unfortunately, one of them I couldn't locate because they  
6     have changed jobs. And the other one just wouldn't agree  
7     saying State Tax Appeals people would start snooping  
8     around. So I couldn't get corporation from my other two  
9     associates at the time.

10            So contrary to what the Respondent had stated, I  
11     did not intentionally discard the business documents I  
12     used to complete my 2012 tax form. Then in 2013 I got  
13     married. So I had moved my home into my husband's home  
14     and inadvertently got rid of my wrong boxes of my tax  
15     returns. So my supporting documents were lost, and I was  
16     unable to recovery them.

17            So after the Franchise Tax Board audited me  
18     in 20 -- November 24, 2015, I just used the remaining  
19     resources I had, which was essentially my overall business  
20     calendar and my credit card statements at that time to try  
21     to recreate what I could on my expenses. So it was the  
22     only reasonable reconstruction I had at that time to do it  
23     and set up.

24            So this is a reasonable reconstruction of my  
25     unreimbursed business expenses for 2012 because they show

1 the name, location, and amount spent on the expenses. I  
2 completed the reconstruction and sent it to Franchise Tax  
3 Board on March 4th of 2016, which was nearly three years  
4 after I had submitted any 2012 tax returns.

5 And that's about all the information I have at  
6 this point, I think.

7 JUDGE ROSAS: Thank you, Ms. Pierce.

8 Ms. Gonzalez, at this point would you like to ask  
9 any additional question of Ms. Pierce?

10 MS. GONZALEZ: No, Your Honor.

11 JUDGE ROSAS: Mr. Miller, would you like an  
12 opportunity to cross-examination the witness?

13 MR. MILLER: No.

14 JUDGE ROSAS: At this point I'm going to turn it  
15 over to my panelist to see if either of them have any  
16 questions.

17 Ms. Hosey?

18 JUDGE HOSEY: No questions. Thank you.

19 JUDGE ROSAS: Mr. Lueng?

20 JUDGE LEUNG: No questions. Thank you.

21 JUDGE ROSAS: Ms. Pierce, other than what you've  
22 testified here today, is there anything else that you  
23 think this panel needs to know in order to make a  
24 well-informed decision?

25 THE WITNESS: I don't think so. I think you guys

1 understand what my argument is.

2 JUDGE ROSAS: Thank you, Ms. Pierce. At this  
3 moment, you may step down from the witness box and return  
4 to your seat. Thank you very much.

5 At this moment, we're going to begin the argument  
6 portion of the hearing. Having concluded Ms. Pierce's  
7 testimony, we have thus concluded the evidentiary portion  
8 of the hearing.

9 Ms. Gonzalez, you have up to 10 minutes for a  
10 closing argument. You may begin whenever you are ready.

11 MS. GONZALEZ: Thank you.

12

13 CLOSING STATEMENT

14 MS. GONZALEZ: The Franchise Tax Board points to  
15 the corporate policy of McCarthy. Yet, Ms. Pierce has  
16 presented to the OTA evidence that the Roseville office  
17 did not follow the corporate policy. Ms. Pierce provided  
18 evidence under oath that the Roseville office only  
19 reimbursed for business expenses that resulted from  
20 construction contracts, which differs from the McCarthy  
21 Corporate reimbursement policy, which reimburses for all  
22 employee expenses.

23 If the Roseville office followed the corporate  
24 reimbursement policy, we would not be here today. If the  
25 Roseville office followed the corporate policy, Ms. Pierce

1 would not have flown all the way here from Montana to  
2 provide evidence that the Roseville office did not follow  
3 the corporate reimbursement policy.

4 We request a reconsideration of Ms. Pierce's  
5 appeal and a finding in her favor. Thank you.

6 JUDGE ROSAS: Thank you, Ms. Gonzalez.

7 FTB, you have up to 10 minutes to make a closing  
8 argument. You may begin whenever you're ready.

9 MR. MILLER: Thank you.

10

11 CLOSING STATEMENT

12 MR. MILLER: Appellant claims an unreimbursed  
13 employee deduction -- employee expense deduction of  
14 \$36,000. This is about one-fourth of her reported wages  
15 in 2012. Appellant's then-employer had a written policy  
16 to reimburse employee expenses that were documented and  
17 directly related to the act of conduct of business,  
18 including expenses for meals and personal vehicle use.  
19 Appellant did not seek available reimbursement for meals,  
20 personal-vehicle use, or other expenses.

21 Under the law, a taxpayer must request available  
22 reimbursement to be entitled to an unreimbursed employee  
23 expense deduction. Because Appellant failed to seek  
24 available reimbursement, Respondent properly disallowed  
25 her claimed deduction. Appellant contends that she did



1 not request for reimbursement because she was concerned  
2 with her then-employer's financial condition and her job  
3 security.

4 But under California law, an employee's concern  
5 for employer's financial condition for fear of being laid  
6 off does not excuse the employee from first seeking  
7 available reimbursement from her employer. She also told  
8 us this morning that she did not discuss curtailing -- she  
9 did not discuss with her employer of a curtailment of her  
10 reimbursement. Apparently, this was never discussed.

11 In Exhibit 7, a declaration she submitted with  
12 her briefs, she said that these expenses were scrutinized,  
13 which is not the same as denied or disallowed by her  
14 employer. In conclusion, reimbursement for documented  
15 expenses directly related to the conduct of business was  
16 available from her then-employer. But Appellant did not  
17 seek reimbursement, and was, therefore, under the law not  
18 entitled to deduct unreimbursed employee expenses.

19 Thank you.

20 JUDGE ROSAS: Thank you, Mr. Miller.

21 Ms. Gonzalez, at this moment you have an  
22 opportunity to make your rebuttal argument, up to five  
23 minutes if you wish.

24 MS. GONZALEZ: Thank you.

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REBUTTAL STATEMENT

MS. GONZALEZ: The reimbursement was not available to sales associates at the Roseville office. It was a practice that was observed -- a practice with the other three sales representatives. Therefore, reimbursement for travel and meal expenses that were related to pursued clients was not available unless a construction contract was signed. This was the practice for the duration that Ms. Pierce was working for McCarthy Building Corporation. Thank you.

JUDGE ROSAS: Thank you, Ms. Gonzalez.

At this moment I'm going to open it up to questions from the panel, questions of either representative.

Ms. Hosey?

JUDGE HOSEY: I have no questions. Thank you so much.

JUDGE ROSAS: Mr. Lueng?

JUDGE LUENG: For the Franchise Tax Board, you referenced that the requirement that the expense must be reimbursed by the employer under California law, must be made to the employer as conditioned for -- and denied by the employer as condition for taking the deduction. Is that requirement also true on a federal return, or just the California requirement?

1           MR. MILLER: It is also required on the federal  
2     return.

3           JUDGE LUENG: Okay. And so she did receive the  
4     deduction on a federal return; correct?

5           MR. MILLER: She claimed the deduction, but the  
6     IRS did not examine her 2012 return.

7           JUDGE LUENG: Okay. Thank you.

8           JUDGE ROSAS: Anything further, Mr. Lueng?

9           JUDGE LUENG: No.

10          JUDGE ROSAS: FTB counsel, either of you, is  
11     there anything else either of you would like to add?

12          MR. MILLER: No.

13          JUDGE ROSAS: Okay. Ms. Gonzalez, the Appellant  
14     has the burden of proof, so I do want to give you the last  
15     word. Other than the pleadings that have been filed in  
16     this case, other than the testimony that we heard this  
17     morning from Ms. Pierce, other than the statements already  
18     heard before us today, is there anything else that you  
19     would like to say to this panel?

20          MS. GONZALEZ: No, Your Honor.

21          JUDGE ROSAS: Okay. Thank you.

22          In that case, that concludes the hearing in the  
23     appeal of Monique Renard Pierce, OTA Case Number 18010967.  
24     The record in this matter is now closed, and the matter is  
25     submitted as of today, November 18th, 2019. This panel

1 will issue a written decision to the parties no later than  
2 100 days from today. Thank you.

3 We can now go off the record.

4 (Proceedings adjourned at 10:22 a.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for  
the State of California, do hereby certify:

That the foregoing transcript of proceedings was  
taken before me at the time and place set forth, that the  
testimony and proceedings were reported stenographically  
by me and later transcribed by computer-aided  
transcription under my direction and supervision, that the  
foregoing is a true record of the testimony and  
proceedings taken at that time.

I further certify that I am in no way interested  
in the outcome of said action.

I have hereunto subscribed my name this 2nd day  
of December, 2019.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER