

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

In the Matter of the Appeal of: ) OTA Case No. 18032418  
**DANIEL J. COWAN AND CINDY COWAN** ) Date Issued: October 18, 2019  
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**OPINION**

Representing the Parties:

For Appellants: Daniel J. Cowan and Cindy Cowan

For Respondent: Parviz T. Iranpour, Tax Counsel

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellants Daniel J. Cowan and Cindy Cowan appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,730, plus applicable interest, for the 2012 tax year.

Appellants waived their right to an oral hearing and therefore the matter is being decided based on the written record.

**ISSUE**

Have appellants shown that they are entitled to the claimed miscellaneous itemized deductions that were disallowed by the FTB?

**FACTUAL FINDINGS**

1. Appellants filed a timely California income tax return (Form 540) for 2012 on March 27, 2013. On their 2012 federal income tax return, appellants reported a total of \$71,614 in itemized deductions, of which \$29,352 were miscellaneous itemized deductions. Appellants reported the same itemized deductions on their 2012 California income tax return, less the \$18,316 claimed deduction for state and local taxes which is not applicable to California.

2. The miscellaneous itemized deductions consisted of unreimbursed employee expenses of \$32,214, and tax preparation fees of \$1,600. Appellants subtracted two percent of their adjusted gross income (\$4,462) in computing the \$29,352 deduction claimed ( $\$223,097 \times .02 = \$4,462$ ;  $\$33,814 - \$4,462 = \$29,352$ ).<sup>1</sup>
3. The FTB disallowed the itemized deduction of \$29,352 and issued a Notice of Proposed Assessment (NPA) dated January 12, 2017. The NPA stated that the FTB had audited appellants' return and requested substantiation for these deductions; however, appellants had not provided such substantiation and the miscellaneous itemized deductions were disallowed. The NPA increased appellants' total tax by \$2,730.
4. Appellants protested by means of a letter dated March 8, 2017, stating: "Proper substantiation for these non-reimbursable expenses is available." No substantiation was provided. The FTB responded on July 12, 2017, requesting specific documents and records to substantiate appellants' claimed expenses, including copies of their employers' policies regarding expense reimbursement and a detailed schedule with supporting documentation for each individual unreimbursed employee expense claimed. When appellants provided no documents in response, the FTB affirmed its proposed assessment by means of a Notice of Action dated October 3, 2017. This timely appeal followed.
5. In their appeal letter to the Office of Tax Appeals dated November 1, 2017, appellants stated: "Proper substantiation for these non-reimbursable expenses is available, but a bit more time is needed to ensure all available information and documentation is properly gathered and reviewed." Appellants have not subsequently provided any documentation, information, or other substantiation for the disallowed deductions.

### DISCUSSION

The FTB's determination is presumed correct and the taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers* (2001-SBE-001) 2001 WL 37126924.) In the absence of credible, competent, and relevant evidence showing error in the FTB's determination, the FTB's determination must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer* (80-SBE-154) 1980 WL 5068.) A taxpayer's failure to produce evidence that is within his control gives rise to a presumption that such evidence, if provided,

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<sup>1</sup> Miscellaneous itemized deductions can be deducted only to the extent those expenses exceed two percent of the taxpayers' adjusted gross income. (See R&TC, § 17201(a) [incorporating IRC section 67].)

would be unfavorable to the taxpayer's case. (*Appeal of Don S. Cookston* (83-SBE-048) 1983 WL 15434.)

Income tax deductions are a matter of legislative grace and the taxpayer bears the burden of establishing entitlement to the deductions claimed. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440; *Smith v. Commissioner* (9th Cir. 2002) 300 F.3d 1023, 1029; *Appeal of James C. and Monablanche A. Walshe* (75-SBE-073) 1975 WL 3557.) To meet this burden, a taxpayer must point to an applicable statute and show by credible evidence that the transactions in question come within its terms. (*Appeal of Robert R. Telles* (86-SBE-061) 1986 WL 22792.)

An individual performing services as an employee generally may deduct expenses incurred in the performance of such services as itemized deductions. (*Richards v. Commissioner*, T.C. Memo. 2014-88.) To deduct expenses incurred in the performance of services as an employee, a taxpayer must not be reimbursed or have the right to reimbursement for such expenses from his employer. (*Ibid.*)

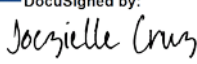
We note that the FTB requested substantiation during the audit and requested specific documents at the protest level. In this appeal, appellants have *again* failed to provide any documentation concerning the expenses they claimed. We have no canceled checks, bank statements, credit card receipts or statements, receipts for cash payments, affidavits from vendors, business journals, mileage logs, travel records, records of reimbursement requests, etc. We have no information about appellants' jobs or the nature of their employment. We have no way to determine what reimbursements appellants might have been entitled to receive – or might have received – from their employers. We have no evidentiary basis to estimate deductible expenses or to determine what expenses might have been ordinary and necessary for persons in appellants' positions. Similarly, we have no documentation or information concerning the tax preparation fees that appellants claimed. Therefore, we have no legal basis to overturn the FTB's determination with respect to the proposed assessment.

HOLDING

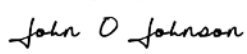
Appellants have not shown any error in the FTB's determination. They have not shown that they are entitled to any portion of the itemized deductions that the FTB disallowed.


DISPOSITION

The FTB's proposed assessment is sustained.

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Joczielle Cruz  
Senior Legal Typist, on behalf of  
Cheryl L. Akin  
Administrative Law Judge

We concur:

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John O. Johnson  
Administrative Law Judge

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Richard Tay  
Administrative Law Judge