OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **B. LOTT AND** **R. MARION**	) OTA Case No. 20025901)))))

OPINION

Representing the Parties:

For Appellants: Kristina Pehur, Tax Appeals Assistance Program (TAAP)[1]

For Respondent: Rachel Abston, Senior Legal Analyst

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, B. Lott and R. Marion (appellants or the couple) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of $3,113 plus applicable interest for the 2015 taxable year. Appellants waived the right to an oral hearing; therefore, the matter is decided based on the written record.

ISSUE

Are appellants entitled to additional California tax deductions?

FACTUAL FINDINGS

1. Appellants were married but separated throughout taxable year 2015. Appellant-husband (B. Lott) resided in California for part of the year and in New Jersey for the remainder of the year. Appellant-wife (R. Marion) resided in California.
2. Appellants filed a timely, joint California Nonresident or Part-Year Resident Income Tax Return. On the return, appellants subtracted B. Lott's New Jersey income from total adjusted gross income from all sources.

[1] Appellants filed an opening brief. Kristina Pehur, of TAAP filed reply and supplemental briefs on behalf of appellants.

3. FTB issued a Notice of Proposed Assessment (NPA) which added to appellants' gross income from all sources the New Jersey income that appellants had subtracted. FTB used that total to calculate the tax rate to be applied to appellants' California source income. FTB also prorated appellants' itemized deductions, allowing $5,539 out of a total of $14,009 claimed on appellants' federal return.[2] This resulted in a proposed addition to tax of $3,113 plus interest, which appellants paid in full on October 8, 2019.
4. FTB issued a Notice of Action (NOA) affirming its NPA on October 28, 2019.[3] This timely appeal followed.

DISCUSSION

When FTB proposes an assessment of additional tax it is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Stabile*, 2020-OTA-198P.) FTB determined that appellants improperly subtracted wages from their total gross income from all sources. On that basis, FTB recalculated appellants' California tax, deductions, and credits, and assessed additional tax and interest. Thus, the burden shifts to appellants to show error in FTB's proposed assessment. (See *Appeal of Vardell*, 2020-OTA-190P [a taxpayer bears the burden of proving that he or she is entitled to an income tax deduction].)

In the case of nonresidents or part-year residents, itemized deductions or the standard deduction shall be allowed in computing taxable income. (R&TC, § 17304.) The portion of allowable deductions is calculated based on the ratio (not to exceed 1.00) that California adjusted gross income (AGI) bears to total AGI. (*Ibid*.) Appellants claimed itemized deductions of $14,009 on their federal return. FTB calculated the prorated share of those deductions for California purposes by dividing the couple's California AGI by their total AGI, which resulted in allowed deductions of $5,539 (39.54 percent of $14,009). Appellants do not dispute FTB's methodology, nor do they dispute the other adjustments FTB made, such as adding B. Lott's New Jersey income back into total gross income and prorating the couple's credits. Specifically,

[2] Appellants concede FTB's adjustments except for the calculation of the California deductions. Thus, that is the only issue we decide here.

[3] FTB acknowledged that appellants made a payment of $3,574.67 but will not apply that payment to appellants' tax liability until the NOA is final, which will not occur until this appeal is final.

appellants argue that their claimed deductions should not be prorated according to the formula because the deductions are all attributable to income earned by appellant-wife in California.

Moreover, appellants assert that had the couple filed separately using a married-filing-separate status, R. Marion would have been able to deduct 100 percent of the itemized deductions. Thus, they conclude that the deductions should not be prorated just because they filed a joint return based on advice of their certified public accountant. Appellants state that "it is not fair to allow [R. Marion] to lose 60.46 percent of otherwise legally allowable California deductions solely because her husband at the time happened to move to another state and as a result, she had to file a Part-Year Resident [I]ncome [T]ax [R]eturn because of him."

In essence, appellants are asking us to disregard the law in favor of equity and fairness. Based on their knowledge and advice at the time appellants filed their federal and California tax returns, they chose one of two available filing statuses. They did so because they believed at the time that it would be advantageous; i.e., result in a lower tax rate. Appellants are free to organize their tax affairs as they choose. (*Commissioner v. National Alfalfa Dehydrating & Milling Co*. (1974) 417 U.S. 134, 149.) Having done so, appellants must also accept the tax consequences of that choice and may not enjoy the benefit of some other route they might have chosen. (*Ibid*.) Whatever their reasons, appellants elected to file with a married-filing-jointly status. Having done so, they must accept the consequences, including the proration of their deductions pursuant to R&TC section 17304. While we understand appellants' seeking a result based on equity and fairness, we only have the power to determine the correct tax under the applicable law. (See *Appeals of Dauberger*, *et al*. (82-SBE-082) 1982 WL 11759.)

HOLDING

Appellants are not entitled to additional deductions beyond those allowed by FTB.

DISPOSITION

FTB's action is sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

DocuSigned by:
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Elliott Scott Ewing
Administrative Law Judge

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