

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19085124
P. BUNA AND)
M. BUNA)
_____)

OPINION

Representing the Parties:

For Appellants: Keith Papish, CPA

For Respondent: David Hunter, Tax Counsel IV

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, P. Buna (appellant-husband) and M. Buna (appellant-wife) (collectively, appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing an assessment of additional tax of \$5,127, plus applicable interest, for the 2014 tax year.

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

ISSUES

1. Whether appellants are entitled to an other state tax credit (OSTC) for the 2014 tax year.
2. Whether appellants are entitled to deduct unreimbursed employee business expenses of \$27,550 (or any other amount) for the 2014 tax year.

FACTUAL FINDINGS

1. Appellants were California residents throughout the entire 2014 tax year.
2. Appellants timely filed their 2014 California resident income tax return, electing the married filing jointly status. On the 2014 California tax return, appellants made a state adjustment by subtracting appellant-husband’s entire wages to arrive at their California adjusted gross income.

3. On March 26, 2019, FTB issued a Notice of Proposed Assessment (NPA), disallowing the subtraction of appellant-husband's wages from appellants' California adjusted gross income, because as California residents, all of their wages were taxable by California, including any wages appellant-husband earned outside of California. The NPA set forth additional tax of \$5,127, plus applicable interest.
4. Appellants filed a timely protest, asserting that appellant-husband's wages were already taxed in North Carolina. As support, appellants provided FTB with a copy of a North Carolina Form 1099-G, indicating that North Carolina issued appellants a state tax refund of \$332 for the 2014 tax year.
5. FTB responded by stating that appellant-husband's wages should still be included in appellants' 2014 California adjusted gross income, but that appellants might be able to qualify for an OSTC. In its letter, FTB requested that appellants provide FTB with a copy of appellants' 2014 North Carolina income tax return and proof that state income tax was paid to North Carolina for the 2014 tax year.
6. Thereafter, appellants provided FTB with appellant-wife's unsigned copy of a 2014 North Carolina nonresident individual income tax return on which she selected the married filing separately filing status, reported no tax paid, and did not report appellant-husband's wages. Appellants did not provide appellant-husband's 2014 North Carolina nonresident individual income tax return to the FTB.
7. On July 16, 2019, FTB issued a Notice of Action affirming the NPA.
8. Appellants timely filed an appeal and provide a copy of appellant-husband's 2014 Form W-2, which lists his wages as taxable by North Carolina and reports North Carolina income tax withholding of \$4,820. In addition, appellants provide the same copy of the North Carolina Form 1099-G (as set forth above), indicating a tax refund of \$332 for the 2014 tax year.
9. FTB received appellants' reply brief in which appellants enclose an amended 2014 California resident tax return and an amended 2014 North Carolina nonresident tax return, both signed and dated on November 16, 2019. The amended 2014 California tax return includes, for the first time, appellant-husband's wages as part of appellants' California taxable income, and a deduction for unreimbursed employee business

expenses of \$27,550.¹ The amended 2014 North Carolina tax return includes both appellants as married filing jointly and sets forth a North Carolina tax of \$4,488, withholding of \$4,820, and a refund of \$332.

10. Subsequently, Office of Tax Appeals (OTA) requested appellants to provide the following support: (1) indicate whether they are still seeking an OSTC for income taxes allegedly paid to North Carolina; (2) provide a recent account transcript, or similar record, from North Carolina issued for the 2014 tax year; (3) provide evidence substantiating their claimed unreimbursed employee business expenses totaling \$27,550; and (4) provide evidence to show whether appellant-husband's wages were paid for work performed in North Carolina.
11. In response, appellants did not state whether they were still seeking an OSTC, did not provide a recent account transcript from North Carolina, and did not establish that appellant-husband performed work in North Carolina to earn his wages. The new information appellants did provide was bank statements from Wells Fargo Bank for the 2014 tax year. These bank statements show that appellant-husband purchased meals, gas, and groceries in North Carolina in 2014 tax year, and made transactions in California throughout the 2014 tax year. The bank statements also show numerous deposits from "NuCompass Mobility" and "Concur Expense" in the 2014 tax year. NuCompass Mobility is a company that specializes in "Instant Access to Worldwide Temporary Accommodations." Concur Expense is the travel expense reimbursement arm of SAP Concur.
12. In an email dated August 10, 2021, appellant-husband's employer confirmed with FTB that it maintained a travel expense reimbursement policy for the 2014 tax year and uses Concur to process payments.

¹ The amount of \$27,550 is claimed on Form 2106-EZ, Unreimbursed Employee Business Expenses, and is comprised of (i) parking fees, tolls, and transportation expenses of \$850, (ii) travel expenses while away from home of \$3,600, and (iii) other business expenses of \$23,100.

DISCUSSION

Issue 1: Whether appellants are entitled to an OSTC for the 2014 tax year.

Tax credits are a matter of legislative grace, and taxpayers bear the burden of proving they are entitled to claimed tax credits. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-046P.) Statutes granting tax credits are to be construed strictly against the taxpayer with any doubts resolved in FTB's favor. (*Ibid.*) FTB's determinations are presumed correct, and the taxpayer bears the burden of proving that the determinations are erroneous. (*Appeal of Morosky*, 2019-OTA-312P.) Unsupported assertions cannot satisfy the taxpayer's burden of proof. (*Ibid.*) Tax returns are not proof of the statements made therein. (*Bruno v. Commissioner*, T.C. Memo. 1990-109.)

California imposes an income tax upon the entire taxable income of every resident. (R&TC, §17041(a)(1).) However, to eliminate double taxation, R&TC section 18001(a) allows a California resident to claim an OSTC against the California net tax for net income taxes imposed by and paid to another state on income derived from sources within that state. It is noted that no credit will be allowed for income taxes imposed by another state until such taxes are actually paid. (Cal. Code Regs., tit. 18, § 18001-1(b).) Receipts showing the payment of such taxes, and a certified copy of the return or returns upon the basis of which such taxes are assessed must be filed with FTB at or prior to the time credit is claimed. (*Ibid.*)

Appellants have not demonstrated that they are entitled to an OSTC for the 2014 tax year.² As noted above, appellants have provided numerous documents throughout the audit, protest, and appeal proceedings, including a Form W-2 for the 2014 tax year, which lists withholding of \$4,820 by North Carolina; Form 1099-G, which lists a refund in the amount of \$332; and an amended joint 2014 North Carolina nonresident income tax return, which appellants signed on November 16, 2019. However, despite OTA's request, appellants have not provided a recent account transcript or similar record from North Carolina showing tax was paid and a refund, if any, was issued for the 2014 tax year. Also, appellants have not provided evidence (e.g., the account transcript or similar document, certified copy of tax return, etc.) from

² On appeal, OTA asked appellants to confirm whether they are seeking the OSTC for alleged income taxes paid to North Carolina for the 2014 tax year. Appellants have not expressly confirmed that they are seeking the OSTC. However, out of caution, and because the documents provided by appellants may suggest that appellants are seeking to show they are entitled to the OSTC, this panel will address whether they are entitled to the OSTC.

North Carolina demonstrating that the amended joint 2014 North Carolina return was ever received and processed. OTA also notes that appellants have not provided a signed and dated copy of appellant-husband's original 2014 North Carolina income tax return. Without such evidence, OTA cannot ascertain what items of income were reported on the North Carolina return that North Carolina ultimately processed. OTA also cannot confirm the North Carolina taxes allegedly paid by appellants and the amount refunded to them (if any). Thus, OTA cannot verify the ultimate net tax appellants paid to North Carolina, after taking into account refunds. Appellants did provide evidence that they received a refund on Form 1099-G from North Carolina; however, the 1099-G was issued before appellants amended their North Carolina tax return and it does not confirm the actual tax paid to North Carolina.

Additionally, the OSTC is allowed only if appellants paid North Carolina taxes on income sourced to North Carolina, determined under California's nonresident sourcing rules. (R&TC, § 18001(a)(1) & (c).) As relevant here, California's nonresident sourcing rules for wages, salaries, and other compensation for personal services require appellants to substantiate what portion of their total compensation is reasonably attributable to personal services performed in North Carolina compared to personal services performed in California.³ (Cal. Code Regs., tit. 18, § 17951-5.) However, nothing in the record suggests that, under California's nonresident sourcing rules, all of appellant-husband's wages were properly sourced to North Carolina because such wages were received exclusively for services in that state rather than in California. Instead, appellant-husband's bank statements show that he made purchases within North Carolina in particular weeks and California in subsequent weeks. Therefore, OTA cannot ascertain what proportion of appellant-husband's services were performed within North Carolina, even though appellants' amended 2014 California tax return claims he lived in North Carolina for 350 days.⁴ For this reason, appellants have not met their burden to show that the taxes paid, if any, to North Carolina are based on income properly sourced to North Carolina, as determined under California law.

³ California Code of Regulations, title 18, section 17951-5 provides rules for allocating personal service income when nonresidents perform services both within and without California.

⁴ On this point, OTA notes that appellants have not provided any documentary evidence supporting that appellant-husband made any payments (e.g., for rent or a mortgage) for a residence in North Carolina, despite the fact that appellant-husband claimed that he lived in North Carolina for 350 days out of the 2014 tax year.

Accordingly, appellants have not established that they are entitled to an OSTC for the 2014 tax year.

Issue 2: Whether appellants are entitled to deduct unreimbursed employee business expenses of \$27,550 (or any other amount) for the 2014 tax year.

Internal Revenue Code (IRC) section 162(a) authorizes a deduction for “all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.” (*Roberts v. Commissioner*, T.C. Memo. 2012-197 (*Roberts*)). R&TC section 17201 incorporates IRC section 162(a) into California law. The performance of services as an employee can constitute a trade or business. (See Treas. Reg. § 1.162-17(a); *Dagres v. Commissioner* (2011) 136 T.C. 263, 281.) A trade or business expense is ordinary for purposes of IRC section 162 if it is normal or customary within the particular trade, business, or industry, and is necessary if it is appropriate and helpful for the development of the business. (*Roberts, supra.*)

An individual performing services as an employee generally may deduct expenses incurred in the performance of such services as an itemized deduction on Schedule A. (*Richards v. Commissioner*, T.C. Memo. 2014-88.) However, Schedule A deductions are subject to various limitations. (*Ibid.*) For example, to deduct expenses incurred through the performance of services as an employee, a taxpayer must not have the right to reimbursement for such expenses from his or her employer. (*Ibid.*)

Appellants have not demonstrated that they are entitled to deduct unreimbursed employee business expenses of \$27,550 (or any other amount) for the 2014 tax year. As noted above, during these appeal proceedings, appellants provided bank statements from Wells Fargo Bank for the 2014 tax year. The bank statements show that appellant-husband purchased meals, gas, and groceries in North Carolina at various times between January 6, 2014, and December 8, 2014. However, the bank statements also show numerous deposits from “NuCompass Mobility” and “Concur Expense” from January 13, 2014, through November 7, 2014.⁵

⁵ NuCompass Mobility is a company that specializes in “Instant Access to Worldwide Temporary Accommodations” and Concur Expense is the travel expense reimbursement arm of SAP Concur.

According to appellant-husband's employer, the company had a travel expense reimbursement policy for the 2014 tax year. In an email dated August 10, 2021, the company confirmed to FTB that the company maintained such a policy for the 2014 tax year. While the employer's confirmation to FTB was not a sworn statement, appellants have not provided evidence demonstrating that appellant-husband was not entitled to seek reimbursement for employment-related expenses for the 2014 tax year.⁶ Moreover, appellants did not submit agreements with NuCompass Mobility or Concur Expense to help determine what relationship, if any, those companies had with appellant-husband's employer or explain why the bank deposits were received. In summary, appellants have not shown that appellant-husband incurred deductible expenses that were not reimbursed or eligible for reimbursement from his employer.

HOLDINGS

1. Appellants are not entitled to claim an OSTC for the 2014 tax year.
2. Appellants are not entitled to deduct unreimbursed employee business expenses of \$27,550 (or any other amount) for the 2014 tax year.

DISPOSITION

FTB's action is sustained in full.

DocuSigned by:

Eddy Y.H. Lam

Eddy Y.H. Lam

Administrative Law Judge

We concur:

DocuSigned by:

Ovsep Akopchikyan

Ovsep Akopchikyan

Administrative Law Judge

DocuSigned by:

Kenneth Gast

Kenneth Gast

Administrative Law Judge

Dated: 5/24/2022

⁶ Appellants must meet specific substantiation requirements to be allowed a deduction under IRC section 162. (IRC, § 274(d); R&TC, §17201.)