

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

In the Matter of the Appeal of: ) OTA Case Number 22019482  
M. WINTERS AND )  
A. JENKS )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: Timothy A. Coons, CPA  
For Respondent: Brian C. Miller, Attorney  
For Office of Tax Appeals: Tom Hudson, Attorney

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Winters (appellant-husband) and A. Jenks (collectively, appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing to assess additional tax of \$21,481 and applicable interest for the 2018 tax year.

Appellants waived their right to an oral hearing, and therefore the Office of Tax Appeals (OTA) decides this matter based on the written record.

**ISSUES**

1. Whether appellants have shown that they are entitled to an increase of the other state tax credit (OSTC) for the 2018 tax year.
2. Whether appellants have shown that they are entitled to increase their deduction for unreimbursed employee expenses and certain other miscellaneous itemized deductions for the 2018 tax year.

**FACTUAL FINDINGS**

1. Appellant-husband’s employment as an umpire required frequent travel in 2018.
2. Appellants resided in California in 2018 and timely filed their 2018 California Resident Income Tax Return (Form 540), and on Schedule CA, California Adjustments, subtracted

- \$186,656 from Line 1 (Wages, salaries, tips, etc.) as out-of-state income.<sup>1</sup> Appellants reported \$3,812 for the Other State Tax Credit (OSTC). They did not report any unreimbursed employee business expenses. Appellants claimed the standard deduction of \$8,802 and received a refund of \$25,543.
3. FTB subsequently audited appellants' 2018 return and disallowed the exclusion of appellant-husband's out-of-state income of \$186,656. FTB allowed the claimed OSTC of \$3,812, and issued a Notice of Proposed Assessment (NPA) for additional tax of \$21,481 and applicable interest.
  4. Appellants protested the NPA, eventually providing an amended California income tax return, which included appellant-husband's out-of-state income of \$186,656 in appellants' taxable income. On the amended return, appellants claimed OSTC of \$7,072<sup>2</sup> instead of their original claimed credit of \$3,812. Instead of the standard deduction of \$8,802, appellants claimed itemized deductions of \$95,589, primarily unreimbursed employee expense deductions.<sup>3</sup>
  5. FTB requested additional documentation, including tax returns filed by appellants in other states, copies of the employer's reimbursement policy, receipts, and additional documents to substantiate the expenses claimed. When no response was received, FTB issued a Notice of Action affirming the NPA, and this timely appeal followed.
  6. On appeal, appellants provided evidence of union dues of \$11,000, investment expenses of \$8,421, and tax preparation fees of \$1,500, which FTB does not dispute. Appellants

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<sup>1</sup> The amount subtracted as appellant-husband's out-of-state income, \$186,656, appears to have been calculated by subtracting the California compensation shown in Box 16 of his Forms W-2 from the total compensation shown in Box 1.

<sup>2</sup> This amount includes state income tax paid to Georgia in the amount of \$553; Illinois in the amount of \$344; Michigan in the amount of \$293; Missouri in the amount of \$1,064; New York in the amount of \$2,526; Ohio in the amount of \$980; and Wisconsin in the amount of \$1,312.

<sup>3</sup> Appellants' amended return claimed employee business expenses other than meals in the amount of \$116,390, meal expenses of \$46,499, and employer reimbursements for meal expenses of \$52,351, which complexly eliminated appellants' reported meals expenses of \$46,499. Appellants subtracted two percent of their federal adjusted gross income (i.e., \$18,036) from their claimed expenses of \$116,390, resulting in a claimed deduction of \$98,354. This amount was added to appellants' other federal itemized deductions of \$28,001, then the subtotal was reduced by \$30,766 to comply with the income-based limitation on itemized deductions, so the total of the itemized deductions claimed on the amended return was \$95,589.

provided a list of “Unreimbursed Expenses by Category”<sup>4</sup> with a total of \$124,427.72.<sup>5</sup> Appellants eventually provided hundreds of pages of additional documentation, including credit card statements, bank statements, and canceled checks.

7. On appeal, FTB concedes that appellants should be entitled to OSTC of \$7,072 as appellants reported on their amended return. Appellants, however, argue the amount of the OSTC should be \$8,033, and provided documents including state income tax returns filed with other states and other tax workpapers to support their argument.

### DISCUSSION

In accordance with R&TC section 17041, California residents are taxed on their entire taxable income regardless of source, while nonresidents are only taxed on income derived from California sources. It is uncontroverted appellants were California residents in 2018. However, on their original 2018 Form 540, appellants subtracted \$186,656 on Line 1 of Schedule CA, to exclude wages earned in other states. FTB disallowed appellants’ subtraction, and on appeal, appellants no longer argue they are entitled to the subtraction. Rather, appellants argue FTB’s proposed assessment should be reduced to allow appellants’ claimed additional OSTC and unreimbursed employee expenses, which FTB disputes. FTB’s determinations are generally presumed correct and taxpayers have the burden of proving otherwise with credible, competent and relevant evidence. (*Appeal of Buehler*, 2023-OTA-215P).

Issue 1: Whether appellants have shown that they are entitled to an increase of the OSTC for the 2018 tax year.

To provide relief from the potential double taxation of income that is also taxed by another state, R&TC section 18001 allows California residents to claim the OSTC against their “net tax” (as defined in R&TC section 17039) for net income taxes imposed by and paid to another “state” on income that is subject to the California personal income tax. The term “state” means “states of the United States, the District of Columbia and the possessions of the United States.” (Cal. Code Regs., tit. 18, § 18001-1(a)(1).) Thus, the term “state” does not include

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<sup>4</sup> Appellant provided a list of expense categories, such as “Dining”, “Hotel”, “Groceries”, and provided sum totals of expenses for each category. Notably, appellants did not provide individual items/expenses claimed for each category.

<sup>5</sup> This amount includes \$52,350.52 of expenses reimbursed by appellant-husband’s employer and the expenses FTB does not dispute.

cities, counties, and other local governments and the OSTC is not available for taxes imposed by and paid to local governments. (R&TC, § 18001(a); *Appeal of Callister* (99-SBE-003) 199 WL 253126.) No credit is allowed until the income taxes imposed by another state are actually paid to that state. (Cal. Code Regs., tit. 18, § 18001-1(b).) Tax withheld during a calendar year is generally credited against the tax for the taxable year with respect to which the amount was withheld. (R&TC, § 19002(a).) Similarly, payments of estimated tax, or any installment thereof are considered payment on account of the taxes imposed for the taxable year. (R&TC, § 19007.) The amount of tax withheld from the wages of a taxpayer is not the tax imposed on that taxpayer but merely represents the amount of tax anticipated to be due to the taxing agency. (*Appeal of Daniel W. Fessler* (1981-SBE-048) 1981 WL 11776.)

Appellants argue they are entitled to more than the \$3,812 they reported on Schedule S of their original 2018 California income tax return. During the protest process and initially on appeal, appellants contend they are entitled to \$7,072 of OSTC. During the appeal, appellants provided additional documents and an amended California return for 2018, and FTB conceded appellants' claim for OSTC of \$7,072. However, appellants countered with a revised claim of \$8,033 for the OSTC, an increase from the amount of FTB's concession, and submitted additional documentation, including workpapers and summaries from their tax preparer.

Appellants revised claim of \$8,033 is not supported by the evidence. In their reply brief, appellants argue they are entitled to additional OSTC for amounts of tax paid in 2018 for the 2017 tax year. However, appellants' payment of their 2017 other state taxes through withholdings and/or estimated tax payments made in 2018, are payments of tax for the 2017, not 2018 tax year. (See R&TC, §§ 19002(a), 19007.) Appellants provide no legal authority allowing OSTC for the 2018 tax year for amounts paid for another tax year, and OTA also finds no authority that would allow such amounts as OSTC. Additionally, appellants include in their claimed OSTC withholding paid to Pennsylvania and Minnesota that were later refunded in full. Such amounts are not eligible for the OSTC. (See R&TC, § 18001(a); *Appeal of Daniel W. Fessler, supra*.)

Appellants also appear to have claimed as OSTC income taxes paid to the cities of Cleveland, Cincinnati, Detroit, and Pittsburgh. The OSTC is not available for income tax imposed by or paid to a local government. (R&TC, § 18001(a); Cal. Code Regs., tit. 18, § 18001-1(a)(1); *Appeal of Callister, supra*; see also Franchise Tax Board, Legal Ruling 2017-01,

February 22, 2017.) Thus, appellants' taxes paid to the cities of Cleveland, Cincinnati, Detroit, and Pittsburgh are not allowable as OSTC.

Appellants provided copies of their 2018 state income tax returns filed in Georgia, Illinois, Michigan, Minnesota, Missouri, New York, Ohio, Wisconsin and Pennsylvania. The total amount of tax reported on these returns for the 2018 tax year is \$7,072. Thus, OTA finds appellants are entitled to the OSTC in that amount, which was already conceded on appeal by FTB. Appellants have not proven they are entitled to any additional credit for the 2018 tax year.

Issue 2. Whether appellants have shown that they are entitled to increase their deduction for unreimbursed employee expenses and certain other miscellaneous itemized deductions for the 2018 tax year.

Internal Revenue Code (IRC) section 162<sup>6</sup> allows a taxpayer to deduct unreimbursed employee expenses as ordinary and necessary business expenses. In accordance with IRC section 67(a), unreimbursed employee expenses are miscellaneous itemized deductions that can only be deducted to the extent they exceed two percent of a taxpayer's adjusted gross income. Subject to that limitation, the deduction is allowed for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." (IRC, § 162(a); see also *Roberts v. Commissioner*, T.C. Memo. 2012-197.) Here, appellants' miscellaneous itemized deduction is limited to the excess of two percent of their federal adjusted gross income or \$18,036 (i.e., \$901,777 x .02). (R&TC, § 17076(a); IRC, § 67(a).)

The parties do not dispute appellants are entitled to some amount of itemized deductions; however, appellants argue they are entitled to more itemized deductions than FTB allowed. Before applying the two percent limitation discussed above, the parties agree that appellants are entitled to deduct miscellaneous itemized deductions for union dues of \$11,000, investment expenses of \$8,421, and tax preparation fees of \$1,500, for a total of \$20,921. This \$20,921 amount exceeds the two percent threshold of \$18,036 by \$2,885, and, thus, appellants' amount of miscellaneous itemized deduction not in dispute is \$2,885.

The parties also agree that appellants are entitled to other itemized deductions of \$28,001, as reported on their amended Schedule CA. The miscellaneous itemized deductions of \$2,885,

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<sup>6</sup> Incorporated by R&TC section 17201.

as discussed above, added to this amount of other itemized deductions equals \$30,886. This amount, FTB argues, is the total amount of itemized deductions appellants are entitled to.<sup>7</sup>

Appellants disagree. Appellants argue they are entitled to additional income tax deductions for appellant-husband's previously unreported unreimbursed business expenses in 2018. In support of this argument, appellants provided numerous bank statements, credit card statements, and canceled checks that evidence hundreds of transactions, which appellants contend support their entitlement to claimed unreimbursed employee expense deductions.

Income tax deductions are a matter of legislative grace and a taxpayer bears the burden of proving by competent evidence, not mere assertions, that the taxpayer is entitled to the deductions claimed. (*Appeal of Vardell*, 2020-OTA-190P.) OTA finds appellants have not met their burden. Here, appellants provided numerous documents with no clear and straightforward guidance so we may link the documentation to appellant-husband's alleged unreimbursed employee expenses. Much of what was provided is irrelevant to this appeal, and clearly constitutes nondeductible personal expenses. (See R&TC, § 17201(c); IRC, § 262(a).) The remainder is unorganized and unclear. OTA need not undertake the task of sorting through voluminous and unorganized documentation in an attempt to find adequate substantiation for claimed deductions. (See *Hale v. Commissioner*, T.C. Memo. 2010-229 [“petitioner offers us what amounts in effect to a shoebox full of papers”]; *Patterson v. Commissioner*, T.C. Memo. 1979-362 [disapproving the “shoebox method” of recordkeeping; see also *Appeal of Amaya*, 2021-OTA-328P].) Thus, appellants' provision of numerous documents does not satisfy their burden of proof.

Moreover, certain kinds of expenses are not deductible unless the taxpayer provides special documentation and substantiation, in accordance with IRC section 274(d). These heightened substantiation requirements apply to deductions for traveling expenses, entertainment, and gifts. Such deductions require substantiation by adequate records or sufficient evidence showing: (1) the amount of the expense; (2) the time and place of the travel or the date and description of the entertainment or gift; (3) the business purpose of the expense; and (4) the business relationship to the taxpayer of the persons receiving the benefit. (R&TC, § 17201; IRC, § 274(d).) Appellants have not met the substantiation requirements for these types of claimed expenses, which are stricter than those required for other kinds of deductions,

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<sup>7</sup> Subject to the limitation set forth in R&TC section 17077, as discussed below.

particularly the deduction of the ordinary and necessary expenses found in IRC section 162. (See *D. A. Foster Trenching Co. v. United States* (Ct. Cl. 1973) 473 F.2d 1398.) For example, for the various expenditures in the record, the business purpose of those expenditures is not explained, and it is unknown if appellant-husband's employer could have or should have reimbursed appellant, or actually did reimburse appellant for these additional claimed expenses.<sup>8</sup> Taxpayers must maintain documentary evidence to establish each element of an expenditure. (*Sievers v. Commissioner* (2014) T.C. Memo. 2014-115.) "General or vague proof, whether offered by testimony or documentary evidence, will not suffice. Specificity is imperative." (*Goldberger v. Commissioner* (1987) 88 T.C. 1532, 1558, internal citation omitted.) Consequently, appellants have not shown they are entitled to itemized deductions for unreimbursed business expenses in excess of the \$30,886 FTB agreed to allow, subject to the following limitation.

For California income tax purposes, itemized deductions are also limited for taxpayers who file a joint return and report an adjusted gross income in excess of \$389,013.<sup>9</sup> (R&TC, § 17077; IRC, § 68.) In 2018, for such high-earning taxpayers, itemized deductions are reduced by the lesser of: six percent of the excess of adjusted gross income over \$389,013, or 80 percent of the amount of itemized deductions otherwise allowable. (*Ibid.*) For the reasons set forth above, appellant is entitled to only \$30,886 of itemized deductions. Consequently, appellants' allowable deduction is limited to 20 percent of their \$30,886 itemized deductions, or \$6,177.<sup>10</sup> Since appellants' itemized deductions allowable does not exceed the standard deduction of \$8,802, appellants are entitled to deduct no more than \$8,802, which FTB already allowed.

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<sup>8</sup> Appellants subtracted \$52,350.52 from their claimed employee expenses as reimbursed expenses; however, appellants have not substantiated the actual amount of per diem reimbursement received for the 2018 tax year or provided appellant-husband's employer's full handbook and/or policy regarding reimbursement of employee expenses.

<sup>9</sup> This amount is established annually pursuant to Revenue and Taxation Code section 17077(c). (See also FTB's 2018 Instructions for Schedule CA (540).)

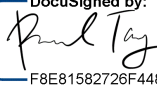
<sup>10</sup> Six percent of \$512,763 (\$901,777 - \$380,013) is \$30,766. Eighty percent of \$30,886 is \$24,709. Appellants' itemized deductions must be reduced by the lesser of these two amounts (i.e., \$24,709), resulting in an allowable amount of \$6,177 (\$30,866 - \$24,709).

HOLDINGS


1. Appellants have shown they are entitled to an OSTC of \$7,072 for the 2018 tax year.
2. Appellants have not shown that they are not entitled to increase their deduction for unreimbursed employee expenses and certain other miscellaneous itemized deductions for the 2018 tax year.


DISPOSITION

FTB’s proposed assessment is modified to allow appellants to take the OSTC in the amount of \$7,072 for 2018, as conceded by FTB. FTB’s proposed assessment is otherwise sustained.

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 Richard Tay  
 Administrative Law Judge

We concur:

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 Ovsep Akopchikyan  
 Administrative Law Judge

DocuSigned by:  
  
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 Cheryl L. Akin  
 Administrative Law Judge

Date Issued: 3/7/2024