

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 230613536
T. GIBBS AND)
S. GIBBS)
_____)

OPINION

Representing the Parties:

For Appellants: T. and S. Gibbs

For Respondent: Tristen Thalhuber, Attorney

For Office of Tax Appeals: Neha Garner, Attorney

E. PARKER, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. Gibbs and S. Gibbs (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,559, an accuracy-related penalty of \$311.80, and applicable interest for the 2017 tax year.

Appellants waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellants have shown error in FTB’s proposed assessment, which is based on a final federal determination.
2. Whether the accuracy-related penalty should be abated.
3. Whether there is a basis to abate interest.

FACTUAL FINDINGS

1. Appellants timely filed a 2017 California Resident Income Tax Return with a filing status of married filing jointly. FTB accepted the return as filed.
2. On July 2, 2021, FTB received information from the IRS that an audit of appellants’ 2017 federal return was completed. The IRS audit determined appellants’ taxable income

- should be increased by \$32,306¹ to account for disallowed Schedule A unreimbursed employee expenses and that a 20 percent accuracy-related penalty should be imposed.
3. On July 21, 2022, FTB issued a Notice of Proposed Assessment (NPA) for the 2017 tax year, proposing to increase appellants' California taxable income by \$32,306, and to impose a 20 percent accuracy-related penalty based on the federal determination.
 4. Appellants timely protested the NPA. Appellants argued that appellant T. Gibbs incurred unreimbursed job-related expenses and that despite providing the necessary documentation to support their reported deductions, appellants were forced to settle with the IRS. Appellants provided spreadsheets listing their claimed unreimbursed employee expenses.²
 5. During protest, FTB confirmed that the IRS's adjustment was not canceled or reduced. FTB sent appellants a letter explaining that since California law is the same as federal law for unreimbursed job-related expenses, FTB's position was that the NPA was correct. FTB requested appellants provide any new information that supported their position.
 6. On May 11, 2023, FTB issued a Notice of Action affirming the NPA because FTB did not receive additional information from appellants.
 7. This timely appeal followed.
 8. During this appeal, FTB provides a copy of appellants' IRS Individual Master File (IMF) transcript indicating the IRS imposed an accuracy-related penalty for an underpayment of tax due to negligence.

DISCUSSION

Issue 1: Whether appellants have shown error in FTB's proposed assessment, which is based on a final federal determination.

R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state how it is erroneous. A deficiency assessment based on a federal adjustment is presumed to be correct and a taxpayer bears the burden of proving FTB's

¹ The IRS disallowed appellants' reported unreimbursed employee expenses of \$34,303. After accounting for the two percent of adjusted gross income limitation, appellants' taxable income increased by \$32,306.

² Appellants also provided a settlement agreement between appellant T. Gibbs and his former employer dated January 8, 2018, and the former employer's bankruptcy report dated May 24, 2019. The relevance of these documents is unclear because they do not discuss appellants' reported unreimbursed employee expenses and they occurred in tax years not on appeal. Therefore, this Opinion will not address these documents further.

determination is erroneous. (*Appeal of Valenti*, 2021-OTA-093P.) Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) A preponderance of the evidence means the taxpayer must establish by documentation or other evidence the circumstances it asserts are more likely than not to be correct. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.)

Income tax deductions are a matter of legislative grace, and the taxpayer bears the burden of establishing entitlement to the deductions claimed. (*Appeal of Dillahunty*, 2024-OTA-024P.) To meet this burden, a taxpayer must point to an applicable statute authorizing the deduction and show by credible evidence that the deduction claimed falls within the scope of the statute. (*Ibid.*)

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.³ 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. (*Deputy v. du Pont* (1940) 308 U.S. 488, 495; *Commissioner v. Heininger* (1943) 320 U.S. 467, 471.) In contrast, personal, living, or family expenses are generally nondeductible. (IRC, § 262.)

Generally, an individual performing services as an employee may deduct expenses incurred in the performance of such services as itemized deductions on federal Schedule A. (*Richards v. Commissioner*, T.C. Memo. 2014-88.) Unreimbursed employee business expenses can be deducted only to the extent those expenses exceed two percent of the taxpayer's federal adjusted gross income under IRC section 67(a).⁴ (*Richards v. Commissioner, supra.*) To be entitled to such deductions, the employee must show that he was neither reimbursed nor entitled to be reimbursed for the expenses by his employer. (*Ayria v. Commissioner*, T.C. Memo. 2022-123.) If the taxpayer's employer has a reimbursement policy that covers the expenses, the taxpayer must show that he sought reimbursement from his employer. (*Ibid.*) The taxpayer bears the burden of proving he is entitled to reimbursement. (*Ibid.*)

IRC section 274(d) prohibits an IRC section 162(a) deduction for the following types of expenses unless they are substantiated by adequate records or by sufficient evidence

³ R&TC section 17201 incorporates IRC sections 162, 262, 274, and 280F into California law, except as otherwise provided.

⁴ R&TC section 17076 incorporates IRC section 67 into California law.

corroborating the taxpayer's own statement: (1) any travel expense, including meals and lodging, away from home; (2) any item with respect to an activity in the nature of entertainment, amusement, or recreation; (3) an expense for gifts; or (4) the use of "listed property," as defined in IRC section 280F(d)(4), which includes passenger automobiles. (See *Roberts v. Commissioner, supra.*) To qualify for a deduction, the taxpayer must substantiate: (1) the amount of the expense or other item; (2) the time and place of the travel, entertainment, amusement, recreation, or use of the property, or the date and description of the gift; (3) the business purpose of the expense or other item; and (4) the business relationship to the taxpayer of the persons entertained or receiving the gift. (IRC, § 274(d).) Generally, expenses subject to the strict substantiation requirements of IRC section 274(d) must be disallowed in full unless the taxpayer satisfies every element of those requirements. (*Sanford v. Commissioner* (1968) 50 T.C. 823, 828.) The tax court has noted that "[r]eceipts often fail as proof because they don't show any particular business purpose." (*H & M, Inc. v. Commissioner*, T.C. Memo. 2012-290; Treas. Reg. § 1.274-5(c)(2)(iii).)

Here, the IRS increased appellants' taxable income by \$32,306 to account for disallowed Schedule A unreimbursed employee expenses. FTB made a corresponding adjustment based on the federal determination and increased appellants' California taxable income by \$32,306. Appellants argue that they had significant unreimbursed expenses but were not given an opportunity to dispute the IRS action. FTB provides a sample of appellants' self-prepared spreadsheets of claimed unreimbursed employee expenses that appellants submitted during protest. On appeal, appellants provide no additional documentation in support of their position.

Appellants' spreadsheets provide a reconciliation of Chase Bank transactions detailing the date, amount, and recipient of each claimed unreimbursed employee expense. However, appellants fail to establish their claimed unreimbursed expenses were ordinary and necessary business expenses and not personal, living, or family expenses, which are generally nondeductible. (See IRC, §§ 162(a), 262.) For example, appellants claim numerous expenses for fast food restaurants, retail stores, grocery stores, iTunes, pest control, and household utility bills without providing an explanation of what was purchased or the business purpose for the expenses.

Additionally, appellants submitted no evidence as to whether appellant T. Gibbs's employer had a reimbursement policy for job-related employee expenses. If a reimbursement policy did exist, appellants submitted no evidence that appellant T Gibbs sought reimbursement for any expenses that qualified for reimbursement. Appellants thus fail to meet their burden of proving they are entitled to reimbursement. (See *Ayria v. Commissioner, supra.*)

Moreover, appellants do not meet the heightened substantiation requirements of IRC section 274(d). For example, appellants fail to provide: (1) the time and place of expenses related to travel; (2) the business purpose of any of the claimed expenses; and (3) the business relationship to the taxpayer of the person receiving the benefit. (IRC § 274(d)(3).) Appellants' spreadsheets claim unreimbursed mileage by listing the date, distance, and addresses, and provide only general descriptions such as "meeting with client," "supply run," or "office work." These descriptions are insufficient to meet the heightened substantiation requirements of IRC section 274(d). Appellants have not shown these expenses are ordinary and necessary business expenses and unrelated to appellants' regular, nondeductible commuting expenses.

Appellants have failed to provide evidence that any of the claimed unreimbursed employee expenses were ordinary and necessary business expenses. Appellants have not met their burden of showing error in FTB's determination.

Issue 2: Whether the accuracy-related penalty should be abated.

R&TC section 19164 generally incorporates the provisions of IRC section 6662, which provides for an accuracy-related penalty of 20 percent of the applicable underpayment. As relevant here, the accuracy-related penalty applies to the portion of the underpayment attributable to negligence or disregard of rules and regulations (negligence). (IRC, § 6662(b).) When FTB's proposed assessment is based on a federal determination that imposed the accuracy-related penalty based on negligence, FTB's imposition of the penalty based on negligence is presumed correct. (*Appeal of Dillahunty, supra.*) The accuracy-related penalty may be reduced or abated to the extent a taxpayer shows that: (1) there is a reasonable basis for the taxpayer's reporting position; (2) the position was adequately disclosed in the tax return (or a statement attached to the return) and there is a reasonable basis for the item; or (3) the taxpayer acted in good faith and had reasonable cause for the understatement. (*Ibid.*)

Here, FTB provides a copy of appellants' IRS IMF transcript as evidence that the IRS imposed an accuracy-related penalty for an underpayment of tax due to negligence. Thus, FTB's imposition of an accuracy-related penalty based on negligence is presumed correct.

Appellants do not provide any evidence or legal authority to establish any of the potential defenses, nor do they otherwise satisfy their burden of proving error in FTB's imposition of the accuracy-related penalty. Appellants have not established the accuracy-related penalty should be abated.

Issue 3: Whether there is a basis to abate interest.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money that should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) To obtain relief from interest, a taxpayer must qualify under the waiver provision of R&TC section 19104 (unreasonable error or delay by FTB in the performance of a ministerial or managerial act), 19112 (extreme financial hardship),⁵ or 21012 (reasonable reliance on FTB's written advice).

Appellants do not allege any statutory provision for interest abatement applies to the facts of this case, and OTA concludes based on the evidence in the record that no statutory provision for abatement of interest applies. Therefore, FTB properly imposed interest and OTA has no basis to abate it.

⁵ OTA has no authority to review FTB's denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy*, *supra*.)

HOLDINGS

1. Appellants have not shown error in FTB’s proposed assessment, which is based on a final federal determination.
2. The accuracy-related penalty should not be abated.
3. There is no basis to abate interest.

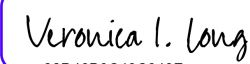
DISPOSITION

FTB’s action is sustained.


DocuSigned by:

 6651E0AAC34B4F6...

 Erica Parker
 Hearing Officer

We concur:
 Signed by:

 32D46B0C49C949F...

 Veronica I. Long
 Administrative Law Judge

Signed by:

 E407D7E70D3E41C...

 Hans Famularo
 Administrative Law Judge

Date Issued: 12/4/2025