

California Revenue and Taxation Code section 19048.³ Upon consideration of respondent's petition for rehearing, we conclude its proffered grounds for a rehearing do not meet the requirements under Regulation section 30604.⁴ (See also *Appeal of Sjöfinar Masri Do*, 2018-OTA-002P, Mar. 22, 2018,⁵ and *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994.)⁶

Background

Prior to September 26, 1991, appellant was a California resident and domiciliary living in La Palma, California. During 1991, appellant earned a substantial amount of income from the licensing of his patents. Appellant filed a California Part-Year Resident Income Tax Return for the 1991 tax year. On that return, he took the position that, on October 1, 1991, he became a California nonresident because, among other alleged facts, he sold his La Palma, California residence on that date.⁷ In addition, he claimed that most of his licensing income was earned after October 1, 1991, and, therefore, as an asserted nonresident, California could not tax the income because it was not derived from sources within the state.

In 1993, respondent initiated an audit of appellant's residency status for the 1991 tax year. Three years later, in 1996, respondent issued a Notice of Proposed Assessment (NPA), concluding that appellant was a California resident for the entire 1991 tax year. The NPA, thus, assessed additional tax of \$1,876,471 and a fraud penalty of \$1,407,353.25, plus interest. Appellant timely protested the NPA.

Almost a decade later, in 2007, respondent issued a Notice of Action (NOA), affirming the NPA.⁸ The NOA concluded appellant was a California resident through April 2, 1992, and,

³ Unless otherwise indicated, all "section" or "§" references are to sections of the California Revenue and Taxation Code, and all regulation references are to the California Code of Regulations, title 18, for the tax year at issue.

⁴ OTA has jurisdiction to decide this matter under Regulation section 30106.

⁵ OTA opinions are generally available for viewing on its website:
<<http://www.ota.ca.gov/opinions/>>.

⁶ BOE opinions are generally available for viewing on its website:
<<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>.

⁷ However, on appeal, appellant took the position that he became a California nonresident on September 26, 1991.

⁸ One of the primary reasons for this long lapse in time between the issuance of the NPA and NOA was that appellant sued respondent in the Nevada courts in 1998 for tortious acts respondent allegedly committed during the audit.

as such, subject to tax on his income from all sources through that date, which included his 1991 licensing income. The assessment was alternatively sustained on the basis that appellant's intellectual property (i.e., patents) had acquired a business situs in California for the entire taxable year, and, therefore, his licensing income therefrom constituted taxable income because it was derived from sources within the state. Appellant timely filed an appeal with the BOE, contesting the residency, sourcing, and fraud penalty issues, as well as requesting abatement of interest.

As part of the appeal, the BOE considered substantial amounts of evidence provided by both parties, including declarations and affidavits from appellant, his friends, and associates, documents relating to the sale of his California home, appellant's rental agreement for a Nevada apartment, various documents related to appellant's licensing activities, travel documents, cancelled checks, invoices, and receipts. After considering this evidence and the extensive arguments presented at the oral hearing,⁹ the BOE concluded that appellant became a California nonresident on October 20, 1991, his licensing income received in 1991 after he became a California nonresident was subject to tax as California source income, the fraud penalty was inapplicable, and interest may not be abated. The BOE issued official notice of its action in a Notice of Board Determination, dated August 31, 2017.

Standard of Review

A rehearing may be granted where one of the following grounds exists, and the substantial rights of the complaining party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law. (Regulation § 30604(a)-(e).)

In its petition, respondent requests a rehearing on the issues of residency and the fraud penalty. Respondent asserts that (1) the BOE's determinations were unjustified due to

⁹The BOE heard the appeals for the 1991 and 1992 tax years on the same day, with this appeal heard first, which lasted nearly 10 hours, and the 1992 appeal heard second, which lasted nearly 3 hours.

insufficient evidence or factual support, (2) the BOE's determinations were contrary to law, and (3) there were irregularities in the BOE's proceedings by which respondent was prevented from having a fair consideration of its case. We consider each argument in turn as it applies in the context of the residency and fraud penalty issues.

Residency

Before addressing the merits of respondent's petition, we first briefly set forth the applicable law on residency. California residents are subject to tax on their entire taxable income, regardless of where that income is earned or sourced. (§ 17041(a)(1).) However, nonresidents—including part-year residents during the period they are nonresidents—are taxed only on income “derived from sources within” California. (§ 17041(b) & (i)(1)(B).)

California defines a “resident” as including (1) every individual who is in California for other than a temporary or transitory purpose, or (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. (§ 17014(a)(1)-(2); see also Regulation § 17014.) In contrast, California defines a “nonresident” in the negative as “every individual other than a resident.” (§ 17015.) California also defines a “part-year resident” as a taxpayer who meets both of the following conditions during the same taxable year: (1) is a California resident during a portion of the taxable year; and (2) is a California nonresident during a portion of the taxable year. (§ 17015.5.) Further, taxpayers who spend an aggregate of more than nine months in California during a taxable year are presumed to be a California resident for the year, but the presumption “may be overcome by satisfactory evidence that the individual is in [California] for a temporary or transitory purpose.” (§ 17016.)

In *Appeals of Stephen D. Bragg*, 2003-SBE-002, May 28, 2003 (*Bragg*), the BOE listed nonexclusive factors to aid in the residency determination. The *Bragg* factors can generally be grouped into three categories: (1) where did the taxpayer register and file certain items, such as tax returns, licenses, vehicles, and voter documents; (2) where did the taxpayer maintain his day-to-day contacts in both his occupational life as well as in his personal life; and (3) where was the taxpayer and his property physically located during the time in question. In *Bragg*, the BOE noted that the weight given to any particular factor depends upon the totality of the circumstances unique to each taxpayer for each tax year. The determination cannot be based solely on the individual's subjective intent, but must instead be based on objective facts. (*Appeal of Anthony V. and Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.)

1) *There Was Sufficient Evidence to Justify the BOE's Decision*

At the trial court level, the equivalent of a petition for rehearing is a motion for a new trial. Code of Civil Procedure section 657 sets forth the grounds for granting a new trial, which has been codified in OTA's Rules for Tax Appeals. (See Regulation § 30604(a)-(e); see also *Appeal of Sjofinar Masri Do, supra* and *Appeal of Wilson Development, Inc., supra*.) As applicable to administrative bodies, such as this one, a rehearing should not be granted on the grounds of insufficiency of the evidence unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that the BOE clearly should have reached a different decision. (Code Civ. Proc., § 657.) In addition, insufficiency of the evidence as a ground for a rehearing means "the insufficiency that arises in the mind[s] of the [administrative law judges] when [they] weigh[] the conflicting evidence and find[] that which supports the [decision] weighs, in [their] opinion, less than that which is opposed to it." (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.)

In its petition, respondent contends the BOE's conclusion that appellant established a Nevada residency as of October 20, 1991, is devoid of factual and legal support, and contrary to the more reliable voluminous and contemporary documentation it provided. Respondent argues that its evidence irrefutably shows that appellant could not have been a California nonresident for any part of the 1991 tax year. As support, respondent points to numerous facts it asserts are true and that contradict the evidence appellant produced.

After weighing the evidence, however, we are not convinced from the entire record, including reasonable inferences therefrom, that the BOE clearly should have reached a different decision. Instead, we believe the BOE relied on sufficient evidence to reach its conclusion that appellant was a California nonresident towards the end of the 1991 tax year.

Specifically, by majority vote, the BOE found that October 20, 1991, was the date appellant became a California nonresident. Based on the BOE members' statements made in the oral hearing transcript, it appears the BOE also found appellant became a California nondomiciliary on October 20, 1991. It, therefore, further appears the BOE analyzed the residency issue under section 17014(a)(1), which, as mentioned above, asks whether appellant, a California nondomiciliary, was in California for other than a temporary or transitory purpose from October 20, 1991, to December 31, 1991. In any event, the primary consideration under either section 17014(a) or 17014(b) is whether the individual is present in California or absent

from California for a temporary or transitory purpose. (*Appeal of Anthony V. and Beverly Zupanovich, supra.*)

Thus, according to the oral hearing transcript, the BOE majority, being cognizant of the *Bragg* factors, noted the following facts, among others, supported its California non-residency determination: (1) on October 20, 1991, appellant moved from the Continental Hotel in Las Vegas, Nevada—where he initially resided after his alleged sale of his La Palma, California home on October 1, 1991—to the Wagon Trails apartment building, also in Las Vegas; (2) shortly after leasing the Wagon Trails apartment, appellant opened utility and telephone services and issued checks to the companies providing those services; (3) appellant obtained a Nevada driver’s license; (4) appellant registered his vehicles in Nevada; (5) appellant registered to vote in Nevada; and (6) although appellant engaged in a unique sale of his La Palma, California home, his assertion that the home was sold on October 1, 1991, was credible, based on corroborating affidavits and the fact that the transaction was not unusual in the real estate industry. We conclude these facts, in addition to the many others in the record, were sufficient to support the BOE’s conclusion that appellant was not in California for other than a transitory or temporary purpose during the disputed period.

Respondent complains that the BOE majority incorrectly found appellant’s hundreds of affidavits and declarations to be credible, even though they were submitted 20 years after 1991 and allegedly contradicted the contemporaneous documentary evidence respondent submitted. However, it appears the BOE debated at length and therefore considered the credibility of the affidavits. It also appears the BOE determined appellant’s testimony was persuasive on this issue.¹⁰ Based on our review, we conclude the BOE’s finding was supported by the evidence. Therefore, we will not disturb it.

Moreover, respondent’s own regulation unequivocally provides that affidavits or testimonies from an individual’s friends, family, and business associates stating that the individual was in California for temporary or transitory purposes are ordinarily sufficient to overcome a presumption of residency. (See Regulation § 17014(d)(1).) That regulation also encourages the submission of affidavits of friends and business associates as to the reasons the individual is outside California for other than temporary or transitory purposes. (*Ibid.*) Further,

¹⁰ For example, in his testimony, appellant explained that he produced the affidavits decades after 1991 because it was only then that respondent created a daily calendar in an attempt to contradict his stated whereabouts during the disputed period.

in *Appeal of Raymond H. and Margaret R. Berner*, 2001-SBE-006-A, Aug. 1, 2002, the BOE found, on the record before it, that the Berners established through affidavits and declarations from friends, family, and professionals that they were domiciled in and resided in Nevada. Therefore, affidavits and declarations, when found to be sufficiently credible, can be instrumental in the residency analysis, as the BOE apparently found in the present case.¹¹

To be sure, respondent submitted compelling evidence of its own that could have arguably established appellant was still a California resident as of April 2, 1992. However, we are not convinced the BOE *clearly* should have reached this result. Rather, the BOE made reasonable inferences and drew well-reasoned, informed conclusions to reach a different, equally plausible result.

In sum, we believe the BOE reasonably considered the probative value of the voluminous evidence submitted by both parties, which included thousands of pages of documents, as well as hundreds of affidavits and declarations produced by appellant in support of his position. Although respondent may disagree with the BOE's weighing of appellant's evidence, that evidence, along with the extensive oral hearing that included the BOE's lengthy questioning of the parties, was sufficient to justify the BOE's decision.

2) *The BOE's Decision Was Not Contrary to Law*

The question of whether a decision is contrary to law (or against the law) is not one which involves a fact-finder weighing the evidence and finding a balance against the decision, as it does in considering the ground of insufficiency of the evidence, discussed above. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*)). Rather, what is required is a finding that the decision was unsupported by any substantial evidence. (*Ibid.*) This requires a review of the decision that "indulg[es] in all legitimate and reasonable inferences" to uphold it. (*Id.* at p. 907.) Thus, the relevant question here does not involve the quality or nature of the reasoning behind the decision, but whether the decision is or is not supportable by substantial evidence in the record. (*Appeal of NASSCO Holdings, Inc.*, 2010-SBE-001, Nov. 17, 2010.) In

¹¹ The BOE was also well within its authority and discretion to consider such evidence. Its Rules for Tax Appeals, similar to respondent's own regulation, in general, broadly provided that "[a]ny relevant evidence, including affidavits, declarations under penalty of perjury, and hearsay evidence, may be presented at a [BOE] hearing. Each party will be permitted to comment on or respond to any affidavits, declarations, or other evidence." (Regulation § 5523.6(a), italics added.)

our review, we consider the evidence in the light most favorable to the prevailing party (here, appellant). (*Sanchez-Corea*, 38 Cal.3d at p. 907.)

On this ground, and similar to what was discussed above, respondent contends that the BOE's determination was contrary to law because respondent's contemporaneous documentary evidence was more reliable than appellant's evidence. Respondent asserts that its evidence establishes that appellant did not terminate his California domicile and residence on October 20, 1991. We disagree. As previously noted, appellant provided voluminous documentary evidence, declarations, and affidavits to demonstrate he was no longer a California resident during the latter part of 1991. The BOE found this date to be October 20, 1991. When viewing appellant's extensive documentary evidence, affidavits, and declarations in the light most favorable to him, we find there was substantial evidence to support that the BOE's determination was not contrary to law.

3) *There Were No Irregularities in the BOE's Proceedings that Prevented Respondent from Having a Fair Consideration of its Case*¹²

Regulation section 30604(a) provides that a rehearing may be granted when an irregularity in the appeal proceedings occurred prior to the issuance of the written opinion that prevented fair consideration of the appeal. This regulatory provision is patterned after Code of Civil Procedure section 657(1), which has been interpreted as sufficiently broad to include any departure by the court (or, here, the BOE) from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected. (*Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.)

On this ground, respondent first contends that the BOE made an erroneous motion that caused an irregularity in the proceedings. Specifically, respondent notes that the BOE passed a motion that appellant became a *resident of Nevada* on October 20, 1991. Respondent asserts that, instead, the BOE should have passed a motion that appellant became a *nonresident of California* on October 20, 1991. Therefore, respondent maintains, the BOE did not determine appellant was a California nonresident, and, as such, he should still be considered a California

¹² Appellant argues that respondent waived its objections and arguments with respect to irregularities in the proceedings in its petition for rehearing because it could have raised these same objections and arguments during the hearing. We are not aware of any authority, however, that supports a contention that any party's failure to raise an objection or argument at a BOE hearing with respect to claims of irregularities will prevent consideration of such objections or arguments in a petition for rehearing. (See Regulation § 30604.)

resident for the entirety of 1991, since a taxpayer may be a resident of two states during the same period for tax purposes.

We disagree with respondent's contention on this point. Neither party argued or presented evidence to the BOE on the issue of whether appellant was a resident of two states simultaneously. Rather, the issue presented to the BOE was whether appellant was a resident or nonresident of California in 1991. The California residency issue was discussed at length over the course of many years during the audit and protest, and the appeals process before the BOE. Even the hearing summary clearly stated that the residency issue was whether appellant was taxable as a resident of California on all his income from September 26, 1991, to December 31, 1991. Moreover, the Notice of Board Determination unequivocally concluded that appellant established he was a *nonresident of California* from October 20, 1991, to December 31, 1991.

Respondent next contends that an irregularity in proceedings occurred when the BOE determined that business-related correspondence to and from appellant could not be considered evidence of his place of residence. Relying on specific statements made by two BOE members at the hearing, respondent argues that the BOE considered business-related correspondence only with respect to the issue of whether appellant's income was sourced to California.

Respondent's contention on this point, however, is also incorrect. The BOE did not make any determination or pass any motion at the hearing indicating that business-related correspondence may not be considered in the residency determination. A discussion by two BOE members as to why they believed certain evidence should be given more or less weight on a particular issue does not constitute the adoption of a new standard of review by the BOE. Instead, it is just an example of Board members, as fact-finders, exercising their discretion in considering the relative weight of the evidence presented by the parties. Furthermore, the BOE had access to and reviewed all the parties' evidence, including the business-related correspondence, and examined all the arguments prior to the hearing. We, therefore, reject respondent's contention that there was an irregularity in the proceeding due to the BOE's alleged failure to take business correspondence into consideration in evaluating any issue.

Respondent further contends that the standard by which the BOE chose to measure the credibility of affidavits submitted on behalf of appellant constitutes an irregularity in the proceedings highly prejudicial to respondent. Respondent alleges that the BOE adopted a rule compelling the unequivocal acceptance of hearsay affidavits for all purposes unless respondent

could elicit testimony from the affiant or a subsequently signed document in which the affiant admits that the statements made were false.

While respondent relies on excerpts from the hearing transcript in which two BOE members discussed why they believed appellant's affidavits may be relied upon as truthful, we fail to see how such a discussion constitutes an adoption or application of a new standard of review. The BOE did not make any motion with respect to the standard of review for affidavits or declarations. Furthermore, the BOE members were advised of the proper evidentiary standard in the hearing summary provided to them prior to the oral hearing. They were, thus, aware that affidavits and declarations could be relied upon to establish a determination of residency. (See Regulation § 17014(d)(1); see also *Appeal of Raymond H. and Margaret R. Berner, supra*; *Appeals of Stephen D. Bragg, supra*.) Accordingly, respondent's argument that the BOE employed an improper standard of weighing the credibility of appellant's affidavits and declarations is without merit.

Finally, the written record is clearly replete with facts supporting the BOE's California non-residency conclusion. Accordingly, respondent has also failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

Fraud Penalty

Respondent next contends that because the BOE made the fraud penalty determination prior to its determination of the other issues in the appeal, there was an irregularity in the proceedings that caused it to not impose the penalty under section 19164(c). Respondent argues that this was improper because the resolution of the fraud penalty was dependent on the resolution of the residency, sourcing, and interest abatement issues.

While the BOE did make a finding on the fraud penalty issue before the substantive issues in the case (see Hearing Transcript at pp. 236-240), we are aware of no procedural requirement that it must decide issues in any particular order. Indeed, the parties had presented all their arguments and evidence on the fraud penalty issue at the oral hearing prior to the BOE's determination of whether that penalty was properly imposed. In addition, both parties discussed the penalty extensively in their briefs. Prior to the oral hearing, the BOE reviewed all the arguments and evidence in the record, including those related to the fraud penalty. For example, Chair Harkey stated the following: "Members, there's a lot of documentation here. I've gone

through reams, and I'm not sure where the Members will fall. But I do wish to state -- I do not believe there was fraud here. I think there's enough back and forth, and I don't think that the FTB has proven fraud." (Hearing Transcript at p. 236, lines 5-10.) Therefore, because the record reflects the BOE considered extensive documentary evidence, oral presentations, and arguments presented by both parties on all the issues prior to concluding on the fraud issue, we find no irregularity in the proceedings.

Finally, the written record contains ample facts supporting the BOE's conclusion that appellant did not commit fraud. For these additional reasons, respondent has failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

Based on the foregoing, respondent has not satisfied the requirements for obtaining a rehearing. Accordingly, respondent's request for a rehearing is denied.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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Douglas Bramhall
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Douglas Bramhall
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