2019 – OTA – 127
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011196
	)
STEPHEN JOHNSON	) Date Issued: April 9, 2019
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Tax Appeals Assistance Program (TAAP)[1]

For Respondent: Freddie C. Cauton, Legal Assistant

For the Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Stephen Johnson (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing an assessment of $1,159 in additional tax, plus interest, for the 2010 taxable year.

Appellant waived his right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUES

1. Did appellant demonstrate error in FTB's proposed assessment, which determined that all his 2010 income was earned while he was a California resident?
2. Did appellant show that interest should be abated?

FACTUAL FINDINGS

1. Appellant filed a 2010 California Resident Income Tax Return (FTB Form 540A), which he signed on December 9, 2011. On the return, he reported federal adjusted gross income (AGI) of $46,154 and listed a post office (PO) box in Milpitas, California, as his address.

[1] Appellant filed his own appeal letter. Jordan Reich of TAAP filed appellant's reply brief and Nick S. Couchot of TAAP filed appellant's supplemental brief.

Appellant attached to his return a Form W-2 issued by Vast Horizons, Inc. (Vast Horizons), which was sent from an employer address in San Jose, California, to the same PO box in Milpitas that appellant used on his state return. The W-2 reported in box 16 that appellant had state wages, tips, etc. of $46,154, which matched his reported California income.

2. Appellant filed a 2010 U.S. Individual Tax Return that he signed on December 9, 2011. In the space for an address "for the year Jan. 1 – Dec. 31, 2010," appellant wrote a home address in Cupertino, California, that includes an apartment number. Appellant attached a Schedule C to his federal return, in which he stated that he was the proprietor of a principal business or profession that performed website development and consulting services, for which he reported total gross receipts and gross income of $33,846, net business income of $13,253, and federal AGI of $12,317. The Schedule C lists a business address that is identical to the home address shown on the first page of the federal return. Appellant did not report any other income. Attached to appellant's federal return was a 2010 Form 1099-Misc issued by Vast Horizons, which reports that it paid appellant nonemployee compensation of $33,846. A San Jose address for Vast Horizons (not the PO box) was reported on the Form 1099-Misc.

3. Appellant filed a 2010 Amended U.S. Individual Income Tax Return (Form 1040X) that he signed on May 1, 2012, in which appellant increased his federal AGI to $58,993. The amended federal return reported a PO box for appellant in Milpitas, California.[2]

4. Subsequently, FTB received information from the Internal Revenue Service (IRS), which is reflected in a Stars Data Sheet, showing that appellant reported federal AGI of $58,993 on his 2010 federal return, a difference of $12,839 more than reported on his California return.

5. On April 7, 2015, FTB issued a Notice of Proposed Assessment (NPA) that increased appellant's California taxable income from $41,132, as reported on his 2010 California return, to $53,971, an increase of $12,839, and proposed an additional tax of $1,159, plus applicable interest. The NPA explained that California law requires that California AGI

[2] Appellant's 2010 amended federal return is stamped "corrected." In a letter to appellant from the IRS dated April 23, 2012, the IRS stated that appellant had filed more than one tax return for the 2010 tax year, and that the IRS had "combined the returns and refigured [his] tax." It is uncertain what sections of the amended federal return were reconfigured by the IRS, since we only have the "corrected" copy of the amended federal return.

match federal AGI. It further stated that FTB would not accept a copy of a federal return as evidence that the IRS had accepted appellant's federal AGI amount.

6. On May 15, 2015, appellant timely protested the NPA on the ground that "none of the figures you document on the assessment form replicate the amounts I have recorded on my federal or California state filings." Appellant contended that the amount of taxable income or AGI claimed by FTB was erroneous and unsupported by any documentation. Moreover, appellant asserted that he had not received notice from the IRS about changes to his 2010 federal return, which led him to question the source of FTB's information. Appellant further stated that he has copies of both his federal and state returns and backup documentation. He stated that he had "not bothered to enclose" his federal return because FTB had indicated that it would not accept a copy of it. Appellant asserted that FTB could get an official record of his tax return from the IRS, or that he could request such a copy from the IRS and provide it to FTB.

7. In a letter dated June 5, 2015, FTB stated that, "[d]ue to workload constraints, it may take several months to resolve your protest. The letter also stated that, "[i]nterest continues to accrue on any unpaid balance during the protest period."

8. On September 8, 2016, FTB sent appellant a copy of his 2010 California income tax return and "income information available to" FTB. FTB stated appellant discussed, in a phone call, that he would be obtaining a copy of his 2010 IRS transcript. FTB further stated that appellant had indicated he would be seeking a copy of his federal transcript from the IRS.

9. On November 10, 2016, FTB issued a Notice of Action (NOA) affirming its NPA.

10. During this appeal, appellant obtained a copy of his federal tax return and a copy of an amended federal tax return. He later filed a reply brief in which he argues for the first time that he was a part-year resident of California, earning $46,154 in gross income within the state of California as a resident, but that in October 2010 he moved from his previous home in California to Reno, Nevada. He claims he earned $12,839 in Nevada as

a resident of Nevada. Appellant asserts that he continued to live in Nevada until 2014, when he moved to South Dakota.[3]

11. In its reply brief, FTB asserts that it examined appellant's evidence and determined that appellant was a resident of California during the whole of 2010.

12. In his supplemental brief, appellant asserts (1) that he left California in October 2010 and thereafter maintained a PO box in Milpitas, California, which was his sole remaining connection to the state, and (2) that he maintained the Milpitas PO box in order to ease the transition from California to Nevada for his business so that people could continue to reach him.

13. A friend of appellant's (Steve Renteria) submitted a declaration dated April 11, 2018 (Renteria statement). The document was notarized but not signed under penalty of perjury. Mr. Renteria stated that he personally picked up mail from the Milpitas PO box, and forwarded it to appellant at a home address in Reno, beginning in "the latter half of 2010 to 2013."

DISCUSSION

Issue 1 – Did appellant demonstrate error in FTB's proposed assessment, which determined that all his 2010 income was earned while he was a California resident?

It is well-settled that FTB's determinations are presumed correct, and a taxpayer has the burden of proving error in such determinations. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers*, 2001-SBE-001, May 31, 2001; *Appeal of Seltzer*, 80-SBE-154, Nov. 18, 1980.)[4] This presumption may be rebutted if the taxpayer presents sufficient evidence to the contrary. (*Appeal of Seltzer*, *supra.*) Evidence used to support a taxpayer's assertions must be credible, competent, and relevant. (*Ibid.*) A taxpayer's unsupported assertions are not sufficient to satisfy his burden of proof. (*Appeal of Walshe*, 75-SBE-073, Oct. 20, 1975.)

California residents are taxed upon their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b),

[3] It appears that appellant has abandoned the issue he first raised (that the adjustment to his income was incorrect), and is instead claiming that a portion of it was earned outside of California. In doing so, he concedes the accuracy of the taxable income shown on the NPA, and now questions whether his business income was sourced to and thus taxable by California.

[4] Published decisions of the Board of Equalization (BOE), designated by "SBE," may generally be found on the BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

and (i), 17951.) Part-year residents are taxed on all income earned while residents of this state, as well as all income derived from California sources. (R&TC, § 17041(b) and (i).) R&TC section 17014 defines a "resident" as: (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. Thus, an individual domiciled in California remains a resident unless he or she leaves for other than a temporary or transitory purpose. (Cal. Code Regs., tit. 18 (Regulation), § 17014; see also R&TC, § 17014.)

Domicile

A California Court of Appeal and the Regulations define "domicile" as the location where a person has the most settled and permanent connection, and the place to which a person intends to return when absent. (*Whittell v. Franchise Tax Board* (1964) 231 Cal.App.2d 278, 284; Regulation, § 17014(c).) An individual may claim only one domicile at a time. (Regulation, § 17014(c).) An individual who is domiciled in California and leaves California retains his or her domicile as long as there is a definite intent to return to California, regardless of the length of time or the reasons for the absence from California. (Regulation, § 17014(c).) To change domicile, a taxpayer must actually move to another residence and intend to remain there permanently or indefinitely. (*In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 641-642; *Estate of Phillips* (1969) 269 Cal.App.2d 656, 659.) If a taxpayer's original permanent home was in California, it will be presumed that California continues to be his or her place of domicile unless it is clearly shown that it changed. (*Appeals of Young*, 86-SBE-199, Nov. 19, 1986; *Appeal of Moss*, 86-SBE-138, July 29, 1986.)

Here, appellant has conceded that he was a California resident through September 2010. While appellant provided the Renteria statement to show that he relocated to Nevada, he has provided no evidence that he actually moved to another taxing jurisdiction and intended to remain there permanently or indefinitely.[5] Therefore, appellant has failed to overcome the presumption that he remained a California domiciliary for the whole of 2010.

Residency

Regulation section 17014(b) states that the underlying theory of R&TC sections 17014 to

[5] Appellant alleges he did in fact move to South Dakota in 2014, and he has a South Dakota mailing address.

17016 is that "the state with which a person has the closest connection during the taxable year is the state of his residence." Thus, the contacts or connections a taxpayer maintains in California, versus other states, are key factors to be considered in determining California residency. (*Appeal of Zupanovich*, 76-SBE-002, Jan. 6, 1976.) Although the actual or potential duration of the taxpayer's presence in or absence from California is very significant in determining his or her residency, it is also important in each case to examine the taxpayer's connections with California and compare them with connections to other places. (*Ibid*.) It is presumed that an individual is a California resident if an individual spends in the aggregate more than nine months of any tax year in California. (Regulation, § 17016.) The presumption may be overcome by satisfactory evidence that the individual is in California for temporary or transitory purposes only. (*Ibid*.)

The BOE has listed nonexclusive factors to aid in determining with which state an individual has the closest connection. (*Appeals of Bragg,* 2003-SBE-002, May 28, 2003.) *Bragg* cautioned that these nonexclusive factors "serve merely as a guide in our determination of residency," and "[t]he weight given to any particular factor depends upon the totality of the circumstances" unique to each taxpayer for each tax year. The *Bragg* factors can be organized into three categories and may be evidenced by various records: (1) registrations and filings records (such as a driver's license, an address on tax returns, or voter registration address), (2) personal and professional associations records (such as where the taxpayer maintains business interests, where the taxpayer's children attend school, or where the taxpayer maintains memberships in social, religious, and professional organizations), and (3) physical presence and property (such as the location of real property owned or rented by taxpayer, taxpayer's telephone records, or origination of checking account and credit card transactions.) (*Id.*)

As discussed above, appellant concedes that he was a resident of California from January through September 2010, earning $46,154 in gross income from California sources as a California resident, but contends that in October 2010, he moved from his previous home in California, to Reno, Nevada, where he earned $12,839 as a resident of Nevada.

The only evidence appellant provides to meet his burden of proving nonresidency is his own statement and the declaration of his friend, which merely claims that Mr. Renteria picked up appellant's mail at a PO box in Milpitas, California, and sent it to appellant's home address in Reno, Nevada from 2010 through 2013. However, neither appellant nor Mr. Renteria state why appellant was outside of California, the address to which mail was forwarded, or whether the

mail consisted of business mail, personal mail, or a combination of both. Moreover, Mr. Renteria's statement does not establish whether appellant ever returned to California during 2010 after he purportedly moved to Nevada. Although Regulation section 17014(d) provides that an affidavit may help to substantiate that a taxpayer was not a resident of California, the notarized statement from Mr. Renteria does not qualify as an affidavit because it was not made under penalty of perjury. Furthermore, it fails to provide sufficient information to overcome the presumption that appellant was a California resident throughout 2010.

Appellant failed to provide any evidence that would support any of the *Bragg* factors for determining with which state appellant had the closest connection. For example, appellant could have provided evidence such as a copy of a Nevada driver's license, a Nevada vehicle registration, a Nevada voter registration, bank statements showing a Nevada institution or a Nevada address, a home purchase agreement, a recorded deed, a home mortgage agreement or a lease showing appellant's home and/or business address in Nevada, telephone, internet provider, and utilities records showing that appellant was located in Nevada, or bank or credit card statements showing purchases made in Nevada. Therefore, we find that appellant's argument, supported only by the Renteria Statement, does not satisfy appellant's burden to show that he ceased to be a California resident in October 2010.

By contrast, the evidence provided by FTB shows that appellant continued to have substantial contacts with California. Appellant's 2010 return, which he filed on December 9, 2011, shows that he had a PO box in Milpitas, California. Appellant's 2010 federal return, which was amended in 2012, lists a Cupertino address and apartment number as his business address. The address the taxpayer uses on his tax returns, both federal and state, and the state of residence claimed by the taxpayer on such returns, is a factor that may be used to establish appellant's state of residence. (*Appeal of Bragg, supra*.) Finally, appellant's 2010 Form 1040X signed on May 1, 2012, continued to list appellant's PO box in Milpitas, CA.

Therefore, we find that appellant has failed to rebut the presumption that he was a resident of California throughout 2010.

Proposed Assessment

R&TC section 17041 imposes a tax "upon the entire taxable income of every resident of this state." R&TC sections 17071 and 17072 define "gross income" and "adjusted gross income" (AGI) by referring to and incorporating, into California law, Internal Revenue Code

(IRC) sections 61 and 62, respectively. By referring to and incorporating the definition of AGI in IRC section 62, R&TC section 17072 requires that the federal AGI entered on a taxpayer's California return must match the federal AGI reported on the taxpayer's federal income tax return. Moreover, any taxpayer filing an amended federal return must also file within six months thereafter an amended state return which shall contain any information FTB shall require. (R&TC, § 18622(b).)

Here, FTB received information from the IRS indicating that appellant filed an amended federal return, increasing his AGI to $58,993, rather than the $46,154 reported on his California return. Because appellant was a California resident throughout 2010, he is taxed on all of his income, regardless of source, pursuant to R&TC section 17041(a). Appellant failed to provide any evidence demonstrating that he did not report a federal AGI of $58,993 on his 2010 amended federal return, that the federal AGI as reported by the IRS to FTB was incorrect, or that FTB's proposed assessment of additional tax was improper. Therefore, we find FTB's determination to be reasonable, rather than arbitrary or without foundation, because it is supported by appellant's own 2010 amended federal return.

Issue 2 - Did appellant show that interest should be abated?

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but it is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Yamachi*, 77-SBE-095, June 28, 1977.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin*, 97-SBE-003, Mar. 19, 1997.) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 19104, 19112, or 21012. (*Appeal of Balch*, 2018-OTA-159P, Oct. 9, 2018.)

R&TC section 21012 is not applicable here because there has been no reliance on any written advice requested from FTB. R&TC section 19112 requires a showing of extreme financial hardship caused by a significant disability or other catastrophic circumstance, which is not alleged by appellant.

R&TC section 19104 allows the abatement of interest to the extent that the interest is attributable in whole or in part to any unreasonable error or delay by an officer or employee of FTB (acting in his or her official capacity) in performing a ministerial or managerial act. The error or delay can be considered only if no significant aspect is attributable to the taxpayer, and

only if the error or delay occurred after FTB contacted the taxpayer in writing about the underlying deficiency. (R&TC, § 19104(b)(1).)

The mere passage of time does not establish error or delay in performing a ministerial act. (See *Lee v. Commissioner* (1999) 113 T.C. 145, 150 [passage of time in litigation does not establish error in ministerial act]; *Howell v. Commissioner*, T.C. Memo. 2007-204; *Larkin v. Commissioner*, T.C. Memo. 2010-73.) Furthermore, to show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, the tax agency exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus abatement should be ordered only "where failure to abate interest would be widely perceived as grossly unfair." (*Lee v. Commissioner*, *supra*, at p. 149.) A decision concerning the proper application of federal tax law, or other federal or state laws, to the facts and circumstances surrounding a taxpayer's tax liability is not a ministerial or managerial act. (Treas. Reg. § 301.6404-2(b); *Bucaro v. Commissioner*, T.C. Memo. 2009-247.)

Appellant, in his opening brief, requests abatement of interest for the roughly 27-month period between the date when he received the NPA dated April 7, 2015, and FTB's issuance of its opening brief in this appeal on July 19, 2017. Appellant asserts on appeal that FTB engaged in an error or a delay because he claims to have requested at protest that FTB provide him a copy of his 2010 federal return, and that FTB did not provide it until it attached a copy to its opening brief, filed on July 19, 2017. Although it took 14 months for FTB to respond to the protest letter, FTB's letter dated June 5, 2015, alerted appellant to the fact that, "[d]ue to workload constraints, it may take several months to resolve your protest." The letter also stated that, "[i]nterest continues to accrue on any unpaid balance during the protest period." Furthermore, contrary to his claim on appeal, appellant's protest letter expresses that he did have a copy of his federal return and just did not enclose it because he believed FTB could obtain a copy. Although the processing of the protest took longer than might be desired, it appears that the cause of any delay was due to FTB's workload constraints, and the necessity of balancing competing priorities and demands. There is no evidence of an unreasonable error or delay in the performance of a ministerial or managerial act. Moreover, there is no abuse of discretion when FTB denies interest abatement if a significant aspect of the delay can be attributed to appellant. (R&TC, § 19104(b)(1).) A significant aspect of FTB's purported delay is attributable to appellant.

Appellant filed an amended federal return, but did not file an amended California return. Appellant's ability to obtain his federal tax return rested with him, and not with FTB. Appellant acknowledged that he contacted the IRS, and obtained a federal transcript. We find that a substantial amount of the delay is appropriately attributed to appellant. Thus, FTB did not abuse its discretion in denying interest abatement to appellant.

HOLDINGS

1. Appellant failed to prove that he was a nonresident for part of the 2010 taxable year, and failed to demonstrate error in FTB's proposed assessment.
2. Appellant failed to establish that interest should be abated.

DISPOSITION

FTB's action is sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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John O. Johnson
Administrative Law Judge