2019 – OTA – 100
Nonprecedential

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18011264
HYGINUS OFFOR	Date Issued: April 4, 2019

OPINION

Representing the Parties:

For Appellant: Hyginus Offor

For Respondent: Rachel Abston, Senior Legal Analyst

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045, Hyginus Offor (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of $2,855,[1] plus interest, for the 2012 tax year. Appellant waived his right to an oral hearing and, therefore, this matter is being decided based on the written record.

ISSUE

Whether FTB erred in determining that one-half of appellant's wages were taxable as community property because appellant had a California domicile and appellant's spouse was a California resident.

FACTUAL FINDINGS

1. Prior to December 2011, appellant, his spouse, and their two children lived in California. For 2011, appellant and his spouse were residents of California.
2. On December 19, 2011, appellant began employment with the United States Department of Veterans Affairs (VA) at a hospital located in Wilmington, Delaware.
3. Appellant's spouse and his minor children remained in California. Appellant's spouse was a California resident for 2012.
4. For 2012, appellant received $43,155 in wage income from the VA.

[1] As noted in greater detail below, FTB concedes on appeal that the additional tax should be $1,898.

5. Appellant and his spouse filed a timely joint 2012 California Resident Income Tax Return, deducting the full amount of appellant's VA wages from their federal adjusted gross income (AGI).
6. FTB examined the 2012 return, and based on its determination that appellant was a California resident, found that appellant and his spouse were not entitled to deduct appellant's VA wages of $43,155 from their AGI.
7. Consequently, FTB issued a Notice of Proposed Assessment (NPA), disallowing the $43,155 deduction and proposing additional tax of $2,855, plus applicable interest.
8. Appellant and his spouse protested the NPA. As relevant to the issues on appeal, they provided a Form W-2 showing that the VA paid appellant $43,155.
9. In response, FTB notified appellant and his spouse that its NPA was correct. FTB stated that married individuals who file a joint return do not qualify for the nonresident spouse exception when one of the spouses is domiciled in California. On this basis, FTB concluded that both spouses were California residents.
10. Appellant replied and argued that, based on FTB Publication 1031, he was eligible for the safe harbor for individuals who are outside of California under an employment-related contract for an uninterrupted period of at least 546 consecutive days.[2] Appellant also argued that when he departed from California, he did not intend to return and, on this ground, argued that he was a permanent resident of Delaware.
11. FTB then requested a copy of appellant's employment contract, but appellant did not respond.
12. FTB issued a Notice of Action affirming its NPA.
13. Appellant then filed this timely appeal. On appeal, appellant provided a letter from the VA, dated December 13, 2011, indicating that appellant's employment in Delaware would begin on December 19, 2011. Appellant also provided his 2012 Delaware tax return, which shows that appellant paid Delaware income tax on the $43,155 of income he earned from the VA.

[2] This safe harbor is set forth in Revenue and Taxation Code Section 17014(d) and generally provides that individuals who are domiciled in this state, but absent from the state for an uninterrupted period of at least 546 consecutive days under an employment related contract, shall be considered outside this state for other than a temporary or transitory purpose.

14. Based on information provided by appellant, FTB agreed to reduce its proposed assessment to $1,898 based on two findings. First, FTB determined that only one-half of appellant's VA income is subject to California tax. FTB based this determination on its conclusion that appellant was a nonresident under the safe harbor rule provided by Revenue & Taxation Code Section 17041(d). FTB also found that although appellant was no longer a California resident, he retained his domicile in California, a community property state. As such, FTB concluded that appellant's VA income was community property, one-half of which belonged to his spouse. FTB determined that as a non-resident, appellant's one-half of the VA income was not subject to tax. However, because appellant's spouse resided in California, her one-half of the VA income was taxable by California. Second, FTB allowed appellant an "other state tax credit" of $409 for tax paid to Delaware.

15. Based on FTB's concession that appellant was not a California resident for 2012, the sole remaining issue on appeal is whether he was domiciled in California such that one-half of his VA income belonged to his resident spouse, who would be taxed on that income in California.

DISCUSSION

As relevant here, the marital property interest of a spouse relating to property acquired during the marriage is governed by the laws of the acquiring spouse's domicile. (*Schecter v. Superior Ct.* (1957) 49 Cal.2d 3, 10.) California is a community property state, meaning that unless otherwise provided by statute, all property, real or personal, wherever situated, acquired during the marriage while domiciled in this state, is community property. (Cal. Fam. Code, § 760.) Thus, the income of a spouse who is domiciled in California is community property under California law.

The above law is well-settled. However, appellant challenges FTB's determination that he was domiciled in California for 2012, asserting that he left California with the intent to never return, as demonstrated by his obtaining "permanent" lodging and employment in Delaware.

Residency and domicile are two distinct concepts. Revenue and Taxation Code section 17014(a) defines a "resident" as every individual who is in this state for other than a temporary or transitory purpose, and every individual domiciled in this state who is outside the state for a temporary or transitory purpose. On the other hand, "domicile" is defined 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; Cal. Code Regs., tit. 18, § 17014(c).) While it is possible for an individual to be a resident of more than one state, an individual may claim only one domicile at a time. (Cal. Code Regs., tit. 18, § 17014(c).) An individual who is domiciled in California and leaves California, retains his or her California domicile so long as there is a definite intention of returning to California, regardless of the length of time or the reasons for absence from California. (Cal. Code Regs., tit. 18, § 17014(c).) To change domicile, a taxpayer must actually move to another taxing jurisdiction and intend to remain there permanently or indefinitely. (*In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 641-42; *Estate of Phillips* (1969) 269 Cal.App.2d 656, 659.)

A taxpayer's intentions determine domicile, but the taxpayer's "intention is not to be determined merely from unsubstantiated statements, but rather, 'the acts and declarations of the [taxpayer] must be taken into consideration." (*Appeal of Robert M. and Mildred Scott*, 81-SBE-020, Mar. 2, 1981.)[3] If a taxpayer's original permanent home was in California, it will be presumed that California continues to be his place of domicile unless he can clearly show that it changed. (*Appeals of John R. Young*, 86-SBE-199, Nov. 19, 1986; *Appeal of Julian T., Jr. and Margery L. Moss*, 86-SBE-138, July 29, 1986.) The maintenance of a marital abode in California is a significant factor in establishing domicile within the state. (*Appeal of Terance and Brenda Harrison*, 85-SBE-059, June 25, 1985; *Appeal of Annette Bailey*, 76-SBE-016, Mar. 8, 1976.) An expectation of returning to one's former place of abode defeats the acquisition of a new domicile. (*Appeal of Robert J. Addington Jr.*, 82-SBE-001 Jan. 5, 1982.) The burden of proof is on the one asserting a change of domicile to prove the acquisition of a domicile in another place. (*Appeal of Terance and Brenda Harrison, supra.*) Where a taxpayer's domicile is unclear, he is presumed to retain his original domicile. (*Whitmore v. Commissioner* (1955) 25 T.C. 293, 297 (*Whitmore*); *Appeal of Anthony J. and Ann S. D'Eustachio*, 85-SBE-040, May 8, 1985 (*D'Eustachio*).)

It is undisputed that appellant was a California domiciliary prior to beginning his employment with the VA in Delaware around December 2011. Also, appellant's spouse and his minor children remained in California, and there is no evidence that they intended to

[3] Opinions of the State Board of Equalization (BOE) may be found on BOE's website at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

subsequently move to Delaware. There is also no indication that appellant was separating or divorcing from his spouse, who remained in California. These facts are significant factors weighing in favor of FTB's position that appellant's domicile remained in California for 2012. However, the letter from VA indicates that appellant began working for VA, in Delaware, in December of 2011, with no set end date for his employment. This fact tends to support appellant's position.

Considering the entire record, it appears to us that appellant's domicile for 2012 is unclear. On the one hand, his spouse and minor children remained in California, which suggests that he intended to return to California. On the other hand, he took a job without a fixed end date in Delaware, which suggests that he may have intended to make his home in Delaware indefinitely. In these circumstances, where it is not clear whether a taxpayer's domicile has changed, we must presume that the taxpayer has retained his prior domicile. (*Whitmore*, *supra*; *D'Eustachio*, *supra*.) Thus, we find that appellant retained his California domicile.

Under California law, appellant's wages constituted community property. Spouses have an equal interest in community property, meaning that half of appellant's VA wages were income to his spouse. (Cal. Fam. Code, § 751.) And as a California resident, appellant's spouse is taxed upon her interest in appellant's wages, even though they were earned outside California. (Rev. & Tax. Code, § 17041, subds. (a), (b), and (i).) Accordingly, appellant's spouse is liable for the California income tax on her one-half community property interest in appellant's wages. Moreover, appellant is jointly liable for the tax on his wife's portion of VA wages, as he filed a joint tax return with his spouse.

HOLDING

One-half of appellant's VA wages were taxable as community property because appellant retained a California domicile and appellant's spouse was a California resident.

DISPOSITION

FTB's action on appellant's protest of the proposed assessment for the year 2012 is modified, in accordance with FTB's concessions, to reduce the additional tax from $2,855 to $1,898. Otherwise, FTB's action is sustained.

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Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

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Grant S. Thompson
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Grant S. Thompson
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge