

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18063371
MATTHEW PALMER AND KRISTIN)	Date Issued: May 24, 2019
STONE)	
)	
)	

OPINION

Representing the Parties:

For Appellant: Eric R. Shivers, CPA

For Respondent: Brian C. Miller, Tax Counsel III

For Office of Tax Appeals: Ellen L. Swain, Tax Counsel

P. KUSIAK, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Matthew Palmer and Kristin Stone¹ (appellant-husband, appellant-wife, or appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing \$4,555² of additional tax, and applicable interest, for the 2013 tax year.

Appellants waived their right to an oral hearing, and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellant-husband established that he was not a California domiciliary during the 2013 tax year.
2. Whether appellant-husband’s Colorado-source income was community property.
3. Whether appellants are entitled to an Other State Tax Credit (OSTC).

¹ Appellant-wife has also used the following names: Mary K. Stone, Mary Kristi S. Palmer, and Kristin Stone Palmer.

² The NOA, based on taxing all of appellant-husband’s Colorado wages, proposed \$10,891 of additional tax, after the application of an Other State Tax Credit (OSTC) of \$8,288. On appeal, the FTB reduced income subject to California tax by \$100,248, thereby reducing tax to \$9,856 before the application of an OSTC. of \$5,301, which further reduces the amount of additional tax to \$4,555.

FACTUAL FINDINGS

1. Appellants filed resident California tax returns (Forms 540) for 2012, 2013, and 2014, reporting married filing jointly status. Appellant-husband and appellant-wife each filed their 2015 California Form 540 returns, reporting married filing separate status.
2. Appellant-husband moved to Colorado after he accepted a job in Denver in 2012. Appellant-husband registered a vehicle in California from October 31, 2012, to October 31, 2013, and maintained a California driver license.
3. Appellant-husband filed a part-year resident Colorado tax return in 2013, listing himself as a part-year resident of Colorado, appellant-wife as his spouse, and a California address. Appellants reported Colorado taxable income of \$273,501 and Colorado tax of \$8,288.
4. On appellants' 2013 California tax return, they claimed an OSTC of \$1,058 for state income taxes paid to Colorado. Appellants reported wages of \$268,728, comprised of \$68,232 appellant-husband earned from California employment and \$200,496 appellant-husband earned from Colorado employment. Appellants claimed a California adjustment by subtracting the \$200,496 appellant-husband earned in Colorado.
5. In a letter dated January 6, 2017, FTB disagreed with the subtraction of \$200,496 of income and requested additional information from appellants. Appellants neither responded to this letter or the follow-up letter sent by FTB on April 5, 2017. FTB then issued an NPA dated August 17, 2017, including \$200,496 of additional income, allowing a \$8,288 OSTC, and proposing additional tax of \$10,891.
6. In a protest letter dated October 16, 2017, appellant-husband argued that he moved to Colorado for a new job with the intention of divorcing his wife and remaining in Colorado. The couple did not create a written separation agreement or agreement for custody of the three children. Following termination from his job in August 2013, appellant-husband returned to California and lived with his wife.
7. FTB determined that appellant-husband was a nonresident of California from January 2013 through September 2013 and a California resident for the remaining portion of 2013. FTB made an income adjustment of \$100,248, which is appellant-wife's community property share of the \$200,496 of Colorado-source income. FTB disallowed the OSTC in full on the basis that appellant-husband was a nonresident. At protest, the

domicile of appellant-husband was not in dispute. These income adjustments increased the additional tax to \$12,465.35. However, FTB concedes the amount of additional tax is limited to the NPA amount of \$10,891.

8. FTB issued an NOA on July 26, 2018, affirming additional tax of \$10,891 and applicable interest. This timely appeal followed.

DISCUSSION

1. Whether appellant-husband established that he was not a California domiciliary during the 2013 tax year.

Every individual domiciled in California who is outside California for a temporary or transitory purpose is considered a California resident for California taxation purposes. (R&TC, § 17014(a)(2).) “Under this definition, a person may be a resident for income tax purposes although domiciled elsewhere and vice versa.” (*Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 285.) One may have multiple residences, but only one domicile. (*Id.*)

Domicile is where an individual has his true, fixed, permanent home and principal establishment. It is the place to which, upon absence, one intends to return. (Cal. Code Regs., tit. 18, § 17014(c).) Once acquired, a domicile remains until it is shown to have been changed. (*DeMiglio v. Mashore* (1992) 4 Cal.App.4th 1260, 1268; *Murphy v. Travelers Ins. Co.* (1949) 92 Cal.App.2d 582, 587; Cal. Code Regs., tit. 18, 17014.) To establish a new domicile requires physical presence plus the simultaneous intention to remain. (*Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 568; *DeMiglio v. Mashore, supra*, 4 Cal.App.4th at 1268; *In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 642.) Absent the intention to remain permanently or indefinitely in a new jurisdiction, moving alone does not establish a new domicile. (Cal. Code Regs., tit. 18, § 17014(c).)

The question of domicile is a mixed question of law and fact. (*Noble v. Franchise Tax Bd., supra*, 118 Cal.App.4th at p. 567.) The FTB’s determinations are presumed to be correct, and a taxpayer has the burden of showing error. (*Todd v. McCoglan* (1949) 89 Cal.App.2d 509; *Appeal of Myers* (2001-SBE-001) 2019 WL 1187160.)

Appellant-husband argues he moved to Colorado to take a job and intended to remain indefinitely to establish his domicile there. In support, appellant contends that he intended to divorce his wife (a California resident). He lived in corporate housing and then moved into an

apartment before he returned to California after losing his job. He did not register a vehicle in Colorado. He never registered to vote in Colorado. He never obtained a Colorado driver license. He did not purchase any real property in Colorado. Once he moved back to California, he left no trace that he intended to establish a domicile in Colorado. Absent any objective facts that appellant-husband intended to establish his domicile in Colorado, we are left with appellant-husband's stated intention alone, which is insufficient to establish that he intended to create his domicile in Colorado when he moved there in 2012.

Furthermore, the facts support a finding that appellant-husband's domicile remained in California. Appellant-wife lived in California, with the couple's three children.³ Appellants filed California married filing jointly returns in 2013 using a California address. Appellant-husband filed as a married, part-year resident in Colorado in 2013 using a California address. California Department of Motor Vehicle records show appellant-husband had a vehicle registered to him in California from October 31, 2012, to October 31, 2013, and he did not obtain a Colorado driver license. Appellants filed as married filing jointly in California in 2012, 2013 and 2014, undercutting appellant-husband's stated intention of obtaining a divorce in 2012. Additionally, these returns listed a California address. Based on these facts, we find appellant-husband was a domiciliary of California in 2013.

2. Whether one-half of appellant-husband's Colorado-source income was includable in appellant-wife's income as community property.

California is a community property state. A California resident spouse is liable for the California income tax on his or her one-half community property interest in the other non-resident spouse's earnings. (*Appeal of Misskelley* (84-SBE-077) 1984 WL 16156.) In addition, one-half of the resident spouse's salary and income may be considered California source income of the nonresident spouse. (*United States v. Mitchell* (1971) 403 U.S. 190; *United States v. Malcolm* (1931) 282 U.S. 792.) The resident spouse who is a domiciliary of California is taxed on out-of-state income of a nonresident spouse who is a domiciliary of California. (*Appeal of Bailey* (76-SBE-016) 1976 WL 4032.)

There is no dispute that appellant-wife was a resident and domiciliary of California. FTB concedes that appellant-husband was a nonresident of California from January through

³The 2013 California return lists three children as dependents and their address in California. The record includes no indication the children relocated to Colorado.

September of 2013. Because we have determined that appellant-husband was domiciled in California, appellant-wife's community property interest in one-half of appellant-husband's Colorado income is taxable in California. Furthermore, appellant-wife, a California resident and domiciliary, is taxed upon her entire income, regardless of the source. Therefore, the couple's California taxable income includes appellant-wife's one-half share of appellant-husband's non-California source income.

3. Whether appellants are entitled to an Other State Tax Credit (OSTC).


Double taxation is avoided by a provision allowing a credit for taxes paid to another state on income subject to the California tax. (R&TC, §§ 18001, 18002; *Whittell v. Franchise Tax Bd.*, *supra*.) Because we are sustaining the FTB's determination that appellant-husband was a California domiciliary, appellant-wife's community property share of appellant-husband's income, \$100,248, is taxable by California. Appellants are entitled to a \$5,301 OSTC, as this income was also taxed by Colorado.

HOLDINGS


1. Appellant-husband was a California domiciliary during the 2013 tax year.
2. One-half of appellant-husband's Colorado income is includable as appellant-wife's community property and taxable in California.
3. Appellants are entitled to an OSTC of \$5,301.


DISPOSITION

FTB's action is modified by its concession to reduce income subject to California tax by \$100,248 and to allow the OSTC of \$5,301. Otherwise, FTB's action is sustained in full.

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Patrick J. Kusiak
Administrative Law Judge

We concur:

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

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Daniel K. Cho
Administrative Law Judge