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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011723
	)
DAVID GRAY	) Date Issued: August 27, 2019
	)
	)
	)
	)
	)

OPINION

Representing the Parties:

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

For Respondent: Brian C. Miller, Tax Counsel III

For Office of Tax Appeals: Josh Lambert, Tax Counsel

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant David Gray appeals an action by the respondent Franchise Tax Board (FTB) in proposing an assessment of additional tax of $5,777, plus interest, for the 2012 tax year. Appellant waived his right to an oral hearing; therefore, this appeal is being decided based on the written record.

ISSUE

Whether appellant qualifies as a California nonresident for the 2012 tax year.

FACTUAL FINDINGS

1. Appellant filed joint California resident income tax returns with his wife from at least 2009 through 2016. The couple reported having the same Novato, California, address on these returns.
2. Forms W-2 issued to appellant and his wife for 2012 reported that they had earned a combined total of $140,260 in wages that year. However, the couple's 2012 California

[1] Appellant prepared his own appeal letter, and Kenneth Curry of TAAP prepared appellant's subsequent briefs.

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tax return included in their California adjusted gross income (AGI) only $29,845 of appellant's income, and $14,017 of his wife's. After applying deductions and exemption credits, the couple reported zero California tax due for 2012.

3. FTB examined the return and discovered that the couple had excluded $87,302 of appellant's foreign earned income from California taxable income.

4. FTB informed the couple that California law, unlike federal, does not permit an exclusion of foreign earned income. FTB determined that because appellant was a California resident for tax purposes during 2012, all his income that year, including the income he earned working overseas, was taxable in California.

5. Based on its determination that the couple erred by excluding appellant's foreign earned income, FTB issued a Notice of Proposed Assessment (NPA) to the couple, proposing an assessment of $5,777 of tax due, plus interest.

6. Appellant protested the NPA, arguing that California could not tax the income he earned while employed in Kuwait.

7. FTB denied the protest and affirmed the NPA by a Notice of Action. Appellant timely appealed the Notice of Action to our predecessor, the State Board of Equalization (SBE).[2]

8. Appellant has produced documentation relative to his whereabouts during the period at issue. Appellant produced a copy of his United States passport, showing dates of his travel overseas. However, for various reasons (including illegibility) appellant's passport, standing alone, is not sufficient to pinpoint appellant's whereabouts. Appellant produced a photocopy of his Kuwait residency permit that was valid from June 9, 2010, through June 7, 2011, and another that was valid from April 15, 2012, through April 1, 2013. Appellant also produced banking deposit information showing regular deposits, apparently of payroll and employment-related reimbursements from Science Applications International Corporation (SAIC), commencing on September 22, 2011, and continuing until January 10, 2013.

9. In his appeal letter, appellant claims that he returned to his home in Novato, California, for rest and relaxation after his overseas contract work for CSA, Ltd. (CSA) had ended in

[2] Only appellant signed the appeal. Hence, this appeal is captioned in appellant's name only.

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February 2010. Appellant states he was hired by SAIC in July 2010 to work overseas (in Kuwait) on its MRAP contract, and that his work there ended in December 2012.[3]

10. However, in his reply brief appellant alleges that he worked overseas for CSA from April 2008 until March 2011, and that he started working overseas for SAIC in April 2011 and continued working there until December 2012 or April 2013, a period of more than 2,000 days. Appellant contends that he "returned to the United States only briefly during that entire period for a period of only a few days." In an email to FTB's protest hearing officer, appellant alleges that he left California around February 2007 and returned in December 2012. Appellant also alleges that during his work on both these contracts, he returned home to California for less than one month in total.

11. Appellant produced a letter from his former employer, SAIC, stating that appellant was employed in Kuwait as a "material handler" for 450 days from September 7, 2011, through November 30, 2012.

12. While appellant was working abroad, his wife and their dependent child lived at the couple's home in California.

13. Appellant returned to California after his employment with SAIC ended.

14. An email from appellant's representative to the Office of Tax Appeals (OTA) dated October 15, 2017, alleged:

> Analysis of the documents shows that Mr. Gray was absent from . . . California on an employment contract from September 7, 2011 until April 1, 2013 in Kuwait for 572 days. This places him over the 546 days required for the safe harbor provision of Cal. Rev. & Tax. Code § 17014.

15. A prehearing conference was held in this matter during which appellant's representative limited the issue for decision by OTA to the issue of whether appellant was a California nonresident pursuant to the safe harbor provision of R&TC section 17014(d) and, if so, whether appellant's spouse still would be taxable on one-half appellant's earned income under California's community property laws.

[3] Neither party has provided us with information as to the nature or anticipated duration of the MRAP contract, other than the fact that it was defense-related, required a secret clearance, and that appellant worked as a "material handler" on this contract.

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DISCUSSION

FTB's determination of residency is presumed to be correct, and a taxpayer has the burden of proving otherwise. (See, e.g., *Appeal of Addington* (82-SBE-001) 1982 WL 11679.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930; *Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

R&TC section 17041(a)(1) provides, in pertinent part, that a tax shall be imposed for each taxable year upon "the entire taxable income of every resident of this state who is not a part-year resident . . . ." The term "resident" includes: (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. (R&TC, § 17014.)

Although appellant appears to have lived and worked in Kuwait for most, if not all, of 2012, appellant does not argue that he was domiciled there. Furthermore, the evidence does not establish that he intended to remain there either permanently or indefinitely. Appellant filed California *resident* income tax returns for the relevant period. Appellant's Kuwait work permits were for *limited* time periods, and appellant has provided us with no information that his contract to work overseas was not time-limited. Furthermore, appellant retained his home in California, his wife and dependent child continued to reside there, and he returned to his California home after his work for SAIC ended. Numerous SBE cases, addressing similar situations, have upheld a finding of California residency in these circumstances. (See, e.g., *Appeal of Bowen* (86-SBE-108) 1986 WL 22730; *Appeal of Gabrik* (86-SBE-014) 1986 WL 22686; *Appeal of Purkins* (84-SBE-081) 1984 WL 16160; *Appeal of Addington*, *supra*; Appeal *of Zupanovich* (76-SBE-002) 1976 WL 4018; *cf.*, *Appeal of Crozier* (92-SBE-005) 1992 WL 92339; *Appeal of Fox* (86-SBE-71) 1986 WL 22713; *Appeal of Debski* (85-SBE-098) 1985 WL 15887; *Appeal of Harrison* (85-SBE-059) 1985 WL 15838; *Appeal of Weaver* (85-SBE-035) 1985 WL 15813; *Appeal of Stevenson* (77-SBE-046) 1977 WL 3856.)

Instead, appellant argues that he should be considered as having been outside of California for other than a temporary or transitory purpose because he qualifies for the safe harbor provision of R&TC section 17014(d). That section provides, in pertinent part, as follows:

> [A] ny individual domiciled in this state who is absent from the state for an uninterrupted period of at least 546 consecutive days under an employment-

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> related contract shall be considered outside this state for other than a temporary or transitory purpose.[4]

Appellant contends he was in Kuwait for an essentially uninterrupted period from the time he was working for SAIC from September 7, 2011, through November 30, 2012 (a period of 450 days, as reflected in his employer's letter), and continuing until the expiration of his Kuwait residency permit on April 1, 2013 (an additional 123 days), for a total of 573 days. FTB alleges that appellant has only established that he was outside of the state for an uninterrupted period of 450 days—the period reflected in appellant's employer's letter. According to FTB, the fact that appellant was permitted, by his Kuwait residency permit, to continue to reside in Kuwait until April 1, 2013, does not show that he continued to live outside of California for employment-related purposes; it only shows that he was permitted to do so.

We agree with FTB. Appellant's evidence does not satisfy his burden of proving that he was absent from California under an employment-related contract for at least 546 consecutive days, as required by the safe harbor provision. Appellant has not established that the time he spent working outside of California for CSA should be aggregated with the time he spent working for SAIC. In this regard, we note that in appellant's appeal letter, appellant admitted to a four-month gap between his work for CSA and SAIC, during which time he returned to his California residence.[5] Hence, we focus only on appellant's employment for SAIC to determine whether he satisfies the 546-day safe harbor period. In this regard, we view the letter from SAIC and appellant's bank deposit information as the most persuasive evidence of the uninterrupted time appellant spent overseas under an employment-related contract.

The employer letter states that appellant worked for SAIC for 450 days. The bank deposit information shows that appellant was receiving payments from SAIC for an additional 41 days after his employment for SAIC ended on November 30, 2012. Even if those two periods

[4] A taxpayer's return to California for up to 45 days during the tax year will be disregarded in determining the 546 consecutive days. (R&TC, § 17014(d)(1).)

[5] In his appeal letter, appellant claimed to have left CSA in February 2011 and returned to his California home. It does not appear that he returned to Kuwait on an employment-related contract until the following July, when he began work for SAIC. We note that appellant appears to have confused the year in which he changed employers, referring to it as 2010 in his appeal letter, and as 2011 in his subsequent filings.

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are added together, they total only 491 days, far short of the 546 days required to qualify for the safe harbor.[6]

Finally, we note that appellant contends the letter provided by his employer is inaccurate and appellant's representations should be enough to establish his nonresidency. He contends: "The burden of proof was on F.T.B. to prove that I am guilty . . . ." But this case is not about guilt or innocence. It is a civil tax dispute in which appellant bears the burden of proof. Appellant's after-the-fact statements as to his whereabouts are not sufficient to carry this burden, particularly in light of the contradictions in appellant's statements and the documentary evidence (from appellant's former employer and from appellant's bank account records). Therefore, we uphold FTB's determination that appellant has not sustained his burden of proving that he qualifies for the safe harbor provision of R&TC section 17014(d).

HOLDING

Appellant has not shown that he was a nonresident of California for the 2012 tax year.

DISPOSITION

FTB's action in sustained.

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Jeffrey Margolis
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Jeffrey I. Margolis
Administrative Law Judge

We concur:

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

[6] Because of the significant, 55-day deficit in meeting the safe harbor requirements, there is no need for us to consider whether any travel to or from Kuwait should be included in computing appellant's absence from California for safe harbor purposes.