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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **L. MAZER AND** **M. MAZER**	) OTA Case No. 19064883)))))

OPINION

Representing the Parties:

For Appellants: Anthony J. Marban, J.D., CPA

For Respondent: Desiree Macedo, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, L. Mazer and M. Mazer (appellants) appeal an action by Franchise Tax Board (FTB) proposing an assessment of additional tax of $4,454, plus applicable interest, for the 2013 tax year.

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

ISSUE

Whether L. Mazer (appellant-husband) was a domiciliary and resident of California during 2013.

FACTUAL FINDINGS

1. In February 2013, appellant-husband moved from California to Malaysia for the purpose of employment as a Product Marketing/Business Development Manager for Symmid Corporation SDN BHD (Symmid).
2. M. Mazer (appellant-wife) did not accompany appellant-husband to live in Malaysia and continued to live at appellants' home in California during 2013. She remained a domiciliary and resident of California during the 2013 tax year. Appellants also have an adult daughter who remained in California.

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3. In March 2014, appellant-husband ceased his employment with Symmid and returned to the home that he shared with appellant-wife in California. In total, appellant-husband was in Malaysia for 13 months.[1]

4. Appellants timely filed a 2013 California Resident Income Tax Return[2] (Form 540) using the married filing jointly filing status and indicating an address in California. On their Schedule CA, they subtracted appellant-husband's wages of $57,307, which represents one-half of that earned in Malaysia.[3]

5. FTB examined appellants' 2013 return and issued a Notice of Proposed Assessment (NPA), which increased appellants' taxable income by the $57,307 and proposed an assessment of additional tax of $4,454, plus interest. The NPA stated that appellants' Schedule CA was incorrect because they are considered to be California residents who are taxable on their income from all sources wherever earned.

6. Appellants protested the NPA, contending that appellant-husband was a nonresident of California. In support, appellants provided a signed contract for employment between appellant-husband and Symmid, dated January 27, 2013. The contract states that the place of employment is Malaysia, with a start date of February 13, 2013, and the duration of employment will be two years and it "may be renewable." The contract further states that Symmid will provide appellant-husband with a leased car, leased apartment, petrol/toll allowance, a cellular phone, and payment for the phone bill. The contract indicates that the offer of employment is subject to appellant-husband obtaining a work permit in Malaysia.

7. Appellants' letter dated February 18, 2019, states that they have provided to FTB a copy of appellant-husband's Malaysian work permit, a rental agreement for appellant-husband's residence in the name of Symmid, and cellular phone and internet service bills

[1] Appellants provide no information as to the reason for appellant-husband ending his employment with Symmid.

[2] We note that when a married couple is taking the filing position that one spouse is a California resident but the other is not, they must file a California nonresident return. (See FTB Publication 1031: Guidelines for Determining Resident Status - 2013.)

[3] It appears the other half represents appellant-wife's community property share of appellant-husband's Malaysia salary that appellants reported as fully taxable in California.

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sent to appellant-husband's Malaysia address. The letter also states that appellant-husband never received a driver's license for Malaysia.

8. FTB issued a Notice of Action that affirmed the NPA. This timely appeal followed.

DISCUSSION

Burden of Proof

FTB's determinations of residency are presumptively correct, and the taxpayer bears the burden of showing error in those determinations. (*Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

Taxation of Residents

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), & (i), 17951.) 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. (R&TC, § 17014(a)(1)-(2); see also Cal. Code Regs., tit. 18, § 17014.) An individual may have several residences simultaneously, but an individual can only have one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c); *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 284.) A "nonresident" is defined as "every individual other than a resident." (R&TC, § 17015.)

Thus, the statutory definition of "resident" contains two alternative tests, the satisfaction of either one leads to a conclusion that the individual is a resident of this state. In determining residency for an individual *not* domiciled in California, the inquiry is whether the individual is in

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California "for other than a temporary or transitory purpose."[4] (R&TC, § 17014(a)(1).) But for an individual domiciled in California, the inquiry is whether the individual "is outside [California] for a temporary or transitory purpose." (R&TC, § 17014(a)(2).) "The key question under either [test] is whether the taxpayer's purpose in entering or leaving California was temporary or transitory in character." (*Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.)

Here, appellant-husband contends he was not a domiciliary of California during 2013. Accordingly, in order to determine which residency test to apply, we must first determine whether appellant-husband was domiciled in California.

Domicile Determination

As mentioned above, an individual can have only one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c).) Domicile is defined as the one location where an individual has the most settled and permanent connection, and the place to which an individual intends to return when absent.[5] (*Appeal of Bragg, supra;* Cal. Code Regs., tit. 18, § 17014(c).) An individual who is domiciled in California and leaves the state retains his or her California domicile as long as there is a definite intention of returning to California, regardless of the length of time or the reasons for the absence. (Cal. Code Regs., tit. 18, § 17014(c).) In order to change domicile, a taxpayer must: (1) actually move to a new residence; and (2) intend to remain there permanently or indefinitely. (*Appeal of Bragg, supra*; see also *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 568 [noting these two elements as indispensable to accomplishing a change of domicile].) Intent is not determined merely from unsubstantiated statements; the individual's acts and declarations will also be considered. (*Appeal of Bragg, supra*; see also *Noble v. Franchise Tax Bd., supra*, 118 Cal.App.4th at pp. 567-568.)

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[4] Individuals 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. (R&TC, § 17016; see also Cal. Code Regs., tit. 18, § 17016.) "It does not follow, however, that a person is not a resident simply because he [or she] does not spend nine months of a particular taxable year in [California]. On the contrary, a person may be a resident even though not in [California] during any portion of the year." (Cal. Code Regs., tit. 18, § 17016; see also *Appeal of Jaffee* (71-SBE-023) 1971 WL 2703.)

[5] Defined another way, domicile refers to the place where individuals have their "true, fixed, permanent home and principal establishment, and to which place [they have], whenever [they are] absent, the intention of returning." (Cal. Code Regs., tit. 18, § 17014(c).) Domicile "is the place in which [individuals have] voluntarily fixed the habitation of [themselves and their] family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce [individuals] to adopt some other permanent home." (*Ibid.*)

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A domicile once acquired is presumed to continue until it is shown to have been changed. (*Appeal of Bailey* (76-SBE-016) 1976 WL 4032.) The burden of proof as to a change of domicile is on the party asserting such change. (*Appeal of Bragg, supra*.) If there is doubt on the question of domicile after presentation of the facts and circumstances, then domicile must be found to have not changed. (*Ibid*.)

It is undisputed that appellant-husband's domicile prior to leaving for Malaysia in February 2013, was California. Accordingly, his place of domicile for 2013 will be presumed to be California unless he can show that it has changed. (*Appeal of Bailey, supra*.) Appellants, on their part, contend that appellant-husband abandoned his California domicile and intended to make Malaysia his permanent home. While appellant-husband's physical presence was in Malaysia, we must examine whether he intended to remain there permanently or indefinitely. (See *Appeal of Bragg, supra*.) Thus, we will examine appellant-husband's acts to determine whether they show that he intended to abandon his old California domicile and establish a new one in Malaysia. (See *Appeal of Berner, supra*.)

While appellant-husband lived and worked in Malaysia, appellant-husband's actions do not indicate he intended to abandon his old domicile and establish a new one. Appellant-wife remained in California at their marital abode that was maintained in his absence, the address of which was used on their 2013 California tax return. The maintenance of a marital abode is a significant factor in resolving the question of domicile. (*Appeal of Bailey, supra*.) Appellants contend that appellant-wife was in California merely to facilitate the transition to Malaysia. However, appellants provide no evidence to indicate any steps taken to move appellant-wife to a new permanent home in Malaysia. In addition, after his employment in Malaysia concluded, appellant-husband returned to the home that was retained in California. An expectation of returning to one's former place of abode defeats the acquisition of a new domicile. (*Appeal of Addington* (82-SBE-001) 1982 WL 11679.)

To summarize, appellant-husband was domiciled in California prior to leaving the state for an employment-related contract expected to last two years and during that period of employment, appellant-wife continued to maintain a home in California, which appellant-husband returned to at the conclusion of his out-of-state employment. These facts indicate that appellant-husband's domicile did not change from California to Malaysia. (See *Appeal of Addington, supra*; Cal. Code Regs., tit. 18, § 17014(c).) Accordingly, appellants have not shown

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that appellant-husband's domicile changed and, therefore, we find that California continued to be appellant-husband's place of domicile during 2013. As a result, because we find that he was domiciled in California, appellant-husband will be considered a resident of California under R&TC section 17014(a)(2) if we determine he was outside the state for a temporary or transitory purpose.

Residency Determination

If a taxpayer is domiciled in California, the facts must be examined to determine whether the taxpayer was outside of the state for a temporary or transitory purpose, such that the taxpayer will continue to be treated as a California resident.[6] (Cal. Code Regs., tit. 18 § 17014.) Whether an individual is outside California for a temporary or transitory purpose is a question of fact to be determined by examining all the circumstances of each particular case. (Cal. Code Regs., tit. 18, § 17014(b); see *Appeal of Addington, supra*.) The determination cannot be based solely on the individual's subjective intent but instead must be based on objective facts. (*Appeal of Berner, supra*.)

An absence for a specified duration of two years or less, and not indefinitely, has been held to be only temporary and transitory. (*Appeal of Crozier* (92-SBE-005) 1992 WL 92339.) However, a stay of less than two years will not automatically indicate a temporary or transitory purpose if the reason for the shortened stay is not inconsistent with an intent that the stay be long, permanent, or indefinite. (*Ibid*.) An absence for employment or business purposes which would require a long or indefinite period to complete is not temporary or transitory. (*Ibid*.) An "indefinite period," however, is not one of weeks or months but one of "substantial duration" involving a period of years. (*Ibid*.)

The underlying theory of R&TC sections 17014 to 17016 is that the state with which a person has the closest connection during the taxable year is the state of his or her residency. (Cal. Code Regs., tit. 18, § 17014(b).) Therefore, in determining a taxpayer's residency, the contacts or connections a taxpayer maintains in California and other states are important factors

[6] There is a safe harbor provision under R&TC section 17014(d), which provides that a California domiciliary absent from this state for an "uninterrupted period" of at least 546 consecutive days (i.e., 18 months) under an employment-related contract shall be considered outside the state for other than a temporary or transitory purpose and thus a nonresident of California. 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).) Appellant-husband does not qualify for protection under the safe harbor provision because he was only outside of California on an employment-related contract for 13 months.

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to take into consideration. (*Appeal of Zupanovich* (76-SBE-002) 1976 WL 4018.) For one thing, such contacts constitute an important measure of the benefits and protections the taxpayer has received from the laws and government of California. (*Ibid*.) Further, such contacts provide objective indicia of whether the taxpayer entered or left this state for temporary or transitory purposes. (*Ibid*.) Where a California domiciliary leaves the state for employment purposes, it is particularly relevant to determine whether, upon departure, the taxpayer substantially severed his or her California connections and then took steps to establish significant connections with his or her new place of abode, or whether the California connections were maintained in readiness for his or her return. (*Appeal of Harrison* (85-SBE-059) 1985 WL 15838.)

Appeal of Bragg, supra, provides a list of nonexclusive objective factors to assist in determining which state an individual had the closest connection during the period in question. However, these factors serve merely as a guide, and the weight given to any particular factor depends upon the totality of the circumstances. (*Appeal of Bragg, supra*.) The focus of the examination of these factors is to determine whether an individual is present for other than a temporary or transitory purpose, and to this end, satisfaction of a majority or a significant number of the factors is not necessarily dispositive. (*Ibid*.) The *Bragg* factors can be organized into three categories, as provided below.

Registrations and filings with a state or other agency, including:

- Homeowner's property tax exemption
- Automobile registration
- Driver's license
- Voter registration/participation history
- Address used and state of residence claimed on federal/state tax returns

Personal and professional associations, including the state of the taxpayer's:

- Employment
- Children's school
- Bank and savings accounts
- Memberships in social, religious, and professional organizations
- Use of professional services, such as doctors, dentists, accountants, and attorneys
- Maintenance/ownership of business interests
- Professional license(s)
- Ownership of investment real property
- Presence/connections/residency as indicated by third-party affidavits/declarations

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Physical presence and property, including:

- Location and approximate sizes and values of residential real property
- Where the taxpayer's spouse and children reside
- Taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls)
- Origination point of the taxpayer's checking account/credit card transactions
- Number/general purpose (vacation, business, etc.) of days the taxpayer spends in California versus other states

In this case, appellant-husband's employment contract was for two years with the possibility of renewal. While appellant-husband returned to California early after completing only 13 months of the contract period, the fact that appellant-husband's employment ended before the end of the two-year term does not require a conclusion that his purpose in moving outside the state was temporary or transitory in character. (*Appeal of Rand* (76-SBE-042) 1976 WL 4058.) However, as discussed below with regard to the *Bragg* factors, appellant-husband did not make significant connections in Malaysia or attempt to sever his connections in California, and we find no evidence indicating that appellant-husband intended to stay in Malaysia for an indefinite period of substantial duration. (*Appeal of Crozier, supra.*)

In addition, appellant-husband's optionally renewable contract does not necessarily indicate that his employment was for a permanent or indefinite term. (See *Appeal of Purkins* (84-SBE-081) 1984 WL 16160; see also *Appeal of Milos* (84-SBE-042) 1984 WL 16121 [taxpayer held to be California resident based on connections after accepting six-month extensions repeatedly over four years].) Appellants provide no evidence indicating that appellant-husband's employment in Malaysia was expected to last indefinitely and, as the *Bragg* factor discussion below illustrates, the evidence indicates that his employment and stay in Malaysia was for a temporary and transitory purpose. (See *Appeal of Milos, supra*.) Without further evidence in support, we cannot find the contract term providing that it "may be renewable" is sufficient on its own to establish that appellant-husband's employment was for an indefinite period of substantial duration. Given the above, we find that appellant-husband's two-year employment contract indicates that his absence from California was for a temporary and transitory purpose. (*Appeal of Crozier, supra*.)

An examination of the *Bragg* factors indicates that appellant-husband was in Malaysia for a temporary or transitory purpose. During the time period appellant-husband was in Malaysia

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for purposes of employment, he did establish connections there, including his apartment lease, vehicle, vehicle registration, and had bills mailed to his Malaysian address. However, these connections were contingent on his employment with Symmid and paid for by his employer.[7] While he had a vehicle provided by Symmid, he did not obtain a Malaysian driver's license, and although he changed his mailing address to Malaysia, the apartment was in the name of Symmid, and the bills sent to his apartment were paid for by Symmid. It has been held that housing, meals, and vehicles provided by an employer as a "matter of job convenience" are not necessarily significant connections. (*Appeal of Stephens* (85-SBE-083) 1985 WL 15861; see also *Appeal of Keeling* (85-SBE-124) 1985 WL 15895.) Similarly, appellant-husband's connections to Malaysia based on his employment existed only so long as he could fulfill his contractual obligations. We find this tends to show that the connections were, like his contract, of limited duration, and not significant, particularly given that no other evidence was provided indicative of a permanent move.

In addition, appellants do not provide evidence that appellant-husband substantially severed his California connections. Appellant-wife lived in California and they continued to maintain their ownership of a house and vehicle in California. Appellants provide no evidence showing steps taken by appellant-wife to move to Malaysia or to move their permanent home from California. Furthermore, once his employment ended in Malaysia, appellant-husband immediately went back to his home in California, which was maintained in readiness for his return. Because appellant-husband's connections with Malaysia were only those provided by his employer as a matter of job convenience and not significant, and he made no attempt to sever his substantial connections with California, we find that his presence in Malaysia was for a temporary or transitory purpose. (See *Appeal of Milos*, *supra*.) Therefore, we find that appellant-husband was a resident of California in 2013 and subject to tax on his entire taxable income, including his income earned in Malaysia.

[7] Appellant-husband was allowed in the country only due to his work permit.

HOLDING

Appellant-husband was a domiciliary and resident of California during 2013.

DISPOSITION

FTB's action is sustained.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Sara A Hosey
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Sara A. Hosey
Administrative Law Judge

DocuSigned by:
Kenny Gast
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Kenneth Gast
Administrative Law Judge

Date Issued: 7/23/2020