

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010932
J. BRACAMONTE AND)
J. BRACAMONTE)
_____)

OPINION

Representing the Parties:

For Appellants: Gregory S. Markow, Attorney
Phillip L. Jelsma, Attorney

For Respondent: Ronald Hofsdal, Tax Counsel IV
Desiree Macedo, Tax Counsel

For Office of Tax Appeals: Neha Garner, Tax Counsel III

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Bracamonte and J. Bracamonte (appellants) appeal an action by Franchise Tax Board (respondent) proposing \$1,592,648 of additional tax and applicable interest for the 2008 tax year, and \$50,337 of additional tax, a late filing penalty of \$12,584.25, and applicable interest for the 2009 tax year.

Office of Tax Appeals Administrative Law Judges Richard Tay, John O. Johnson, and Huy “Mike” Le held an oral hearing on December 14, 2020.¹ At the conclusion of the hearing, we closed the record and submitted this matter for decision.

ISSUE²

Whether appellants were California residents on July 18, 2008, such that the proceeds from the sale of Jimsair Aviation Services, Inc. (Jimsair) are subject to California taxation.

¹ The oral hearing was noticed for Sacramento, California, and conducted electronically due to COVID-19.

² At the oral hearing, appellants clarified their position on the late filing penalty, which is that the penalty must be abated only if they prevail on the residency issue. Appellants made no additional argument at the hearing to support abatement of the penalty. Since, as discussed below, appellants have not prevailed on the residency issue, the late filing penalty will not be abated and, consequently, we do not address this issue further.

FACTUAL FINDINGS

1. Appellants, a married couple, lived in and were residents of California through 2007. Appellants, individually and/or through their family trust, owned all the outstanding shares of Jimsair, a corporation.
2. Appellants purchased a California home, which they owned from 1988 through December 2017.³
3. On February 25, 2008, appellants drove to Henderson, Nevada, and stayed for three days (February 25 to February 27) at a hotel or motel. While in Henderson, appellants looked for an apartment to rent and secured an apartment on February 26, 2008.
4. During their three-day stay in Henderson, appellants obtained a post office box and set up the option to have their mail forwarded to them.⁴ Appellants also registered to vote in Nevada and obtained Nevada driver's licenses. Appellant-husband obtained a cell phone number with a Nevada area code, and appellants also opened new Wells Fargo bank accounts in Henderson, Nevada.
5. After their three-day stay, appellants traveled to their property in Lake Havasu City, Arizona, and stayed for one day (February 28). On that day, they changed the address of their preexisting Wells Fargo account to reflect their Nevada mailing address.
6. On March 6, 2008, appellants took possession of the apartment in Henderson, Nevada. The initial rental period ran from March 1, 2008, to August 31, 2008; however, appellants later extended the rental period to September 30, 2008.
7. On the same day they took possession of the apartment, appellants updated their mailing address for a life insurance policy to reflect their new Henderson, Nevada address. Appellant-husband also had an eye exam in Nevada. Later, on March 21, 2008, appellants had their Chevrolet Avalanche serviced at a Jiffy Lube located in Henderson, Nevada. Later, in May, appellants registered their Chevrolet Avalanche in Nevada.

³ Appellants assert that when they moved from California to Nevada in February 2008, they did not make immediate arrangements to sell their California home due to the economic recession, their need to continue caring for appellant-wife's father, who passed away in September 2016, and appellant-husband's focus on starting a new business in Nevada. Appellants assert that they put their California home on the market in April 2015, but as of December 15, 2017, it had not sold, even though appellants had reduced the asking price a number of times.

⁴ Appellant-husband testified that appellants had the post office forward their mail to Montana a few times in 2008 while on lengthy travels in their motorhome, but never to California.

8. On March 22, 2008, appellants attended a real estate auction in Las Vegas; however, they did not find a house to purchase at that auction.
9. On April 2, 2008, appellants hired The Rushforth Firm in Nevada and paid them a \$1,000 retainer to change their family trust from a California trust to a Nevada trust.
10. Two days later, on April 4, 2008, appellants purchased a trailer in Nevada and later registered the trailer in Nevada on May 13, 2008.
11. In May 2008, appellants purchased a 2008 Harley Davidson motorcycle in California and arranged for the motorcycle to be delivered directly to Arizona as an out-of-state purchase. They did not take possession of it in California. Appellants assert that they also relocated and re-registered an electric cart from California to Arizona.
12. In or around May 2008, appellants hired Jim Robertson, a real estate broker in Henderson, Nevada, to help appellants find a house. In the summer of 2008, appellants made offers to buy three different houses, but none of their offers were accepted.
13. From February 25, 2008, through July 18, 2008, appellants made numerous trips between their properties in California, Arizona, and Nevada. In total, from February 25, 2008, through July 18, 2008, appellants spent 28 days in Henderson, Nevada, 90 days at their property in Escondido, California, and 19 days at their property in Lake Havasu City, Arizona.

Sale of Jimsair

14. Appellants testified that in May 2008, they first learned of an opportunity to sell Jimsair. The buyer contacted appellant-husband in May, and a week later, appellants met the buyer in San Diego.
15. The buyer agreed to purchase Jimsair, and on June 2 and June 11, 2008, appellants executed various closing documents in Henderson, Nevada, for the sale of Jimsair.
16. The sale of Jimsair closed on July 18, 2008. The proceeds from the sale they received in the 2008 tax year were deposited into their Wells Fargo account in Nevada. As a result of the sale of Jimsair, appellants received \$16,699,000 in 2008 and \$617,522 in 2009.

Events Following the Sale of Jimsair

17. On or around July 23, 2008, appellants terminated their post office box in Escondido, California.

18. Appellants registered three vehicles (1999 Yamaha XL1200, 2005 Yamaha FX Cruiser, and 2005 Zieman watercraft trailer) in Arizona on August 22, 2008.⁵
19. Subsequently, on September 22, 2008, appellants closed on the purchase of a home in Henderson, Nevada.
20. For the 2008 tax year, appellants received Forms W-2 from Jimsair, reporting wage income.⁶
21. From July 18, 2008, through December 31, 2008, appellants made numerous trips between their properties in California, Arizona, and Nevada. In total, from July 18, 2008 through December 31, 2008, appellants spent 72 days in Nevada, 24 days at their property in Escondido, California, and 25 days at their property in Lake Havasu City in Arizona.

Procedural Background

22. Appellants filed FTB Form 540NR for the 2008 tax year. Appellants did not file a timely California income tax return for the 2009 tax year.
23. Respondent audited appellants' 2008 and 2009 tax years and issued Notices of Proposed Assessment (NPAs). Appellants protested the NPAs, and respondent issued Notices of Action affirming the NPAs.
24. Appellants filed this timely appeal.

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 Mazer*, 2020-OTA-263P.) This presumption is a rebuttable one and will support a finding only in the absence of sufficient evidence to the contrary. (*Appeals of Seltzer, et al.* (80-SBE-154) 1980 WL 5068.)

Respondent's determinations cannot, however, be successfully rebutted when the taxpayer fails

⁵ It is noteworthy that appellants maintained California motor vehicle registrations for these three vehicles as of July 18, 2008. According to California Department of Motor Vehicle records, appellants also maintained California motor vehicle registrations for the following: a 2003 Jeep Grand Cherokee, 2001 Chrysler GEM 825, 1998 Monaco Dynasty, 1997 Yamaha YVZ350, 1999 Yamaha XL1200, 2005 Yamaha FX Cruiser, 2005 Ziema, 1995 TXBRG, 2000 SPCNS, 2003 Polaris, and 2004 Yamaha YZ-250.

⁶ Appellants assert that they stopped receiving salaries from Jimsair on or around February 29, 2008.

to present credible, competent, and relevant evidence as to the issues in dispute. (*Ibid.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Taxation of Residents

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 California who is not a part-year resident. Part-year residents are taxed on their income earned while residents of this state, as well as all income derived from California sources. (R&TC, § 17041(b), (i).) R&TC section 17014(a) provides that 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. Thus, an individual domiciled in California remains a resident until he or she leaves for other than a temporary or transitory purpose. (See also Cal. Code Regs., tit. 18, § 17014.)

In this appeal, the dispute over appellants' residency is focused on a single transaction – the sale of Jimsair on July 18, 2008. The result of the dispute controls whether appellants must pay California income tax on the net gain from appellants' sale. (See R&TC, § 17041(a)(1).) The parties agree that if appellants are found to be California residents on July 18, 2008, the undisputed date of the sale, the net gain of appellants' sale is taxed in full by California, regardless of whether the income has a source in this state. The parties also agree that if, on the other hand, appellants changed their residency status before July 18, 2008, the proceeds from the sale are not taxable at all by California, because income derived from the sale of intangible property, such as their sale of stock in Jimsair, is sourced to the taxpayer's out-of-state residence, unless the property has acquired a business situs in this state. (R&TC, § 17952.)

Appellants argue that they ceased being residents of California and established their domicile in Nevada on February 26, 2008,⁷ the day they secured an apartment in Nevada. After they secured the apartment, and before July 18, 2008, appellants performed a number of changes that actualized their intention to move, including opening a Nevada post office box (to which they forwarded their mail from their California post office box), registering to vote in Nevada,

⁷ There was some confusion as to appellants' position regarding the specific date they ceased being California residents. At the oral hearing, appellants clarified their position that February 26, 2008, was the day they ceased being California residents.

obtaining a Nevada cell phone number, establishing care with an eye-care provider, servicing their automobile and purchasing and registering a trailer in Nevada. Appellants also testified to having attended real estate auctions in Las Vegas, Nevada, but they noted they failed to purchase a home before the sale of Jimsair.

To determine appellants' residency, the first question we turn to is whether appellants were domiciled in California. 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. (*Appeal of Mazer, 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 Mazer, 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 Mazer, supra*; see also *Noble v. Franchise Tax Bd., supra*, 118 Cal.App.4th at pp. 567-568.)

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 Mazer, 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.*)

We find that appellants have not met their burden. To successfully relinquish their California domicile, appellants must have changed 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.*)

It is uncontroverted that appellants had a California domicile prior to 2008. Despite their purported intent to change their California domicile, appellants did not “adopt some other permanent home” when they took possession of their rented apartment in Henderson, Nevada. Rather, their possession of their apartment was marked with impermanence. Appellants rented the apartment in Henderson, Nevada on March 6, 2008, because, as appellant-husband testified at the oral hearing, they “needed a temporary place to live.” Appellants testified that, as they looked for a permanent home, they decided to secure an apartment in the area of their desired future home to make purchasing a home easier. Appellants eventually purchased a home in September 2008,⁸ but until then, appellants retained their large California home, and left much of their personal property at their California home and spent a majority of their time there from February 25, 2008, through July 18, 2008. Appellants testified that they only took essentials to their Nevada apartment, such as linens, towels, dishes and some basic furniture. Notably, they left their precious mementos and other valuable items in California until they acquired a “permanent home” in Nevada. “In order to change one’s domicile, one must actually move to a new residence and intend to remain there permanently or indefinitely.” (*Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.) Appellants’ possession of a rental apartment was part of their plan to find a permanent home, but was not the actual move to a new residence with the intent to remain there permanently. The impermanence of the apartment evidences their intention of returning to their California home until they found a suitable Nevada replacement. Consequently, we find that appellants retained their California domicile through July 18, 2008, and did not change their “permanent home” when they took possession of their apartment.

Since appellants were domiciled in California, we turn to the question of whether appellants were outside California for a temporary or transitory purpose, such that the taxpayer will continue to be treated as a California resident. (R&TC, § 17014(a)(2); 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).) The determination cannot be based solely on the individual’s subjective intent but instead must be based on objective facts. (*Appeal of Mazer, supra.*)

⁸ Respondent concedes that appellants changed their domicile to Nevada as of September 29, 2008.

In situations where the taxpayers have significant contacts with more than one state, as appellants do here, the state with the closest connections during the taxable year is the state of residence. (Cal. Code Regs., tit. 18, § 17014(b).) The contacts that taxpayers maintain in this and other states are important objective indications of whether their presence in, or absence from, California was for a temporary or transitory purpose. (*Appeal of Berner, supra.*) Such contacts are a measure of the benefits and protection that the taxpayers have received from the laws and government of California and as objective indicia of whether the taxpayers entered or left this state for temporary or transitory purposes. (*Ibid.*)

To evaluate a taxpayer's contacts with a state, *Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264, provides a list of nonexclusive factors that are helpful in determining which state an individual had the closest connection to the period in question. These factors can be separated into three categories: (1) registrations and filings with a state or other agency; (2) personal and professional associations; and (3) physical presence and property. (*Appeal of Mazer, supra.*) However, these factors are not exclusive, and serve merely as a guide. (*Ibid.*) The weight given to any particular factor depends upon the totality of the circumstances. (*Ibid.*)

Here, there are numerous relevant connections in California and Nevada that are significant that we will summarize below. We believe appellants' testimony that they were in the process of moving from California to Nevada and establishing residency in Nevada.⁹ However, as of July 18, 2008, we find that appellants had not "relinquished . . . their residence in California." (*Noble v. Franchise Tax Bd., supra*, 118 Cal.App.4th at pp. 569.)

Although appellants began to increase their contacts with Nevada, their contacts with California remained significant. Appellants had numerous vehicles and vessels registered in California, including a Harley-Davidson that was purchased in June 2008 and registered in California. Appellants maintained their California post office box address, numerous bank accounts, and established care with healthcare professionals in California. Prior to the sale of Jimsair, appellants conducted business in San Diego, including holding meetings with attorneys about ongoing litigation and meetings that ultimately led to the sale of Jimsair. These connections favor California residency.

⁹ The record is replete with evidence that appellants' Nevada contacts increased after July 18, 2008. Appellants bought a permanent home, registered more of their vehicles and vessels in Nevada, started a business, voted, and spent most of their time at their new home. However, the relevant date for this appeal is July 18, 2008, and we find subsequent events unpersuasive to the residency determination as of that date.

Most significantly, appellants' physical presence in California from February 26, 2008, the date appellants argue they moved out of California, to July 18, 2008, far outweighed their presence in any other state. As stated above, appellants were in California for 90 days, and in Henderson, Nevada for only 28 days. We find the sheer amount of time spent in California, and the average length of their stay in the respective homes significant.¹⁰ Indeed, physical presence is a factor of greater significance than mental intent and the formalities that tie one to a particular state. (*Noble v. Franchise Tax Bd.*, *supra*, 118 Cal.App.4th at pp. 567; *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278.) Thus, despite appellants' actions to transition to becoming Nevada residents, we find their physical presence in California most persuasive.

Appellants argue that their purpose for being in California after February 25, 2008, was temporary and transitory because they purportedly were in California just to care for family members, and to manage occasional business needs. However, the amount of time appellants spent in California and the breadth of their activities, in addition to the little time they spent actually in Nevada, indicates they were more than just a seasonal visitor to California. (See *Appeal of Berner*, *supra*.) Furthermore, having found appellants remained domiciled in California during the relevant period, the question is not whether they were in California for temporary or transitory purposes, but instead whether they were in a location other than California for other than temporary or transitory purposes. When applying the correct test, the facts show that, contrary to appellants' contention, appellants' time in Nevada is better described as for temporary and transitory purposes.

Since appellants were California domiciliaries and were physically in California for a majority of the time leading up to and on July 18, 2008, we find that appellants' strongest connections were with California. Appellants maintained a permanent home in California, spent the most time in California prior to July 18, 2008, and did not spend much time in Nevada, their purported state of residence. Thus, we find that appellants availed themselves of the benefits and protections of California the most, and consequently, are California residents for tax purposes. Therefore, on the date of the sale of the stock of Jimsair (July 18, 2008), we find that appellants

¹⁰ Between March 6, 2008, when appellants took possession of their apartment, to July 18, 2008, appellants stayed in California an average of 8.5 days at a time. Appellants' stays in Nevada averaged just 2.18 days.

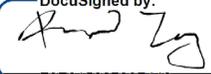
were residents of California and thus subject to personal income tax on the installment sale income received in both 2008 and 2009.¹¹

HOLDING

Appellants were California residents on July 18, 2008, and therefore the proceeds from the sale of Jimsair are subject to California taxation.

DISPOSITION

We sustain FTB’s action in full.

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Richard Tay
Administrative Law Judge

We concur:

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John O. Johnson
Administrative Law Judge

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Huy “Mike” Le
Administrative Law Judge

Date Issued: 3/22/2021

¹¹ For purposes of the proposed assessment for the 2009 tax year, we do not make a determination of appellants’ residency status on any date after July 18, 2008, because even if appellants were nonresidents in 2009, their recognized gain from the installment sale payment they received in 2009 is still sourced to California. (Cal. Code Regs., tit. 18, § 17952(d).)