

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 19034475
W. SMOOT AND)
K. SMOOT)
_____)

OPINION

Representing the Parties:

For Appellants: Ileane Polis,
Tax Appeals Assistance Program (TAAP)¹

For Respondent: Rachel Abston, Senior Legal Analyst

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, W. Smoot and K. Smoot (appellants) appeal an action by respondent Franchise Tax Board (FTB) in proposing an assessment of additional tax of \$1,619, plus applicable interest, for the 2013 tax year.

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

ISSUE

Whether appellants were California residents for any portion of the 2013 tax year.

FACTUAL FINDINGS

1. Appellants filed a joint 2013 California Resident Income Tax Return (Form 540). After subtracting a California adjustment (Schedule CA) of \$24,829, appellants reported taxable income of \$60,501 and tax of \$1,624. After applying exemption credits and

¹ Appellants filed their opening brief. Scott Dutra of TAAP filed appellants’ reply brief. Ileane Polis of TAAP filed appellants’ supplemental brief.

- withholdings, appellants reported an overpayment of \$61, which FTB refunded. Appellants' return listed an address in California.
2. Subsequently, FTB examined appellants' return and determined that appellants had not substantiated the Schedule CA income adjustment (subtraction) of \$24,829. Based on the foregoing, FTB issued a Notice of Proposed Assessment (NPA), proposing additional tax of \$1,619, plus applicable interest.
 3. Appellants timely protested the NPA, asserting that the income of \$24,829 was not taxable by California because it consisted of wages earned by appellant-husband during a portion of the 2013 tax year he was living and working in Alaska.
 4. After reviewing the matter, FTB sent appellants a position letter stating that FTB disallowed the subtraction of \$24,820 because appellants were California residents during the entire 2013 tax year, and therefore, all of appellants' income was subject to California taxation, including any wages earned while appellant-husband was living and working outside of California.
 5. When no reply was received, FTB affirmed the NPA in a Notice of Action. 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 Mazer*, 2020-OTA-263P.) 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, Nonresidents, and Part-Year 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.) Part-year residents are taxed on their entire taxable income earned while residents of this state (regardless of source), as well as all income derived from California sources while nonresidents. (R&TC, § 17041(b) & (i).)

California defines a “resident” as: (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.) A “nonresident” is defined as “every individual other than a resident.” (R&TC, § 17015.) A “part-year resident” is defined as a taxpayer who meets both of the following conditions during the same taxable year: (1) is a resident of this state during a portion of the taxable year; and (2) is a nonresident of this state during a portion of the taxable year. (R&TC, § 17015.5.)

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. (*Appeal of Mazer, supra.*) In determining residency for an individual *not* domiciled in California, the inquiry is whether the individual is in California “for other than a temporary or transitory purpose.”² (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, appellants contend that they were not domiciliaries of California as of April 2013, when appellant-husband moved to Alaska for the purpose of employment. Accordingly, in order to determine which residency test to apply, we must first determine whether appellants changed their domicile in April 2013.³

² 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.)

³ While appellants subtracted only appellant-husband’s wages on their California return, appellants argue that they both abandoned their California domicile and became nonresidents in 2013. Therefore, because there may be potential tax impacts, such as with regard to community property laws, we will address whether both appellant-husband and appellant-wife remained California domiciliaries and residents throughout the 2013 tax year.

Domicile Determination

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.⁴ (*Appeal of Mazer, supra*; Cal. Code Regs., tit. 18, § 17014(c).) 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.) 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 Bragg* (2003-SBE-002) 2003 WL 21403264; 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.*)

It is undisputed that appellants' domicile prior to leaving for Alaska was in California. Accordingly, their place of domicile for 2013 will be presumed to be California unless they can show that it has changed. (*Appeal of Bailey, supra*.) Appellants contend that appellant-husband was not a California domiciliary after leaving in April 2013 for a permanent job in Alaska. Appellants state that appellant-husband chose to stay in temporary housing while in Alaska because he wanted to start his job as soon as possible. Appellants assert that at the end of

⁴ 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.*)

July 2013, appellant-husband stopped working for the employer and moved back to live with appellant-wife in California.

With regard to appellant-wife, appellants contend that she travelled to Alaska in June 2013 to assist appellant-husband with looking for a new family home, thereby showing her intention to abandon her California domiciliary in favor of a new one. Appellants assert that appellant-wife returned to California “only to sell the family home, quit her job, and sever ties with her community for good.” Appellants add that, after appellant-husband’s job ended in July of 2013, appellants were “lucky in being able to rent their former home” and that appellant-wife “thankfully got her job back.”

Appellants have not provided any evidence demonstrating that they mutually intended (or alternatively, individually intended) to remain in Alaska permanently, or even indefinitely.⁵ For example, although appellants contend that appellant-husband accepted a “permanent job” in Alaska, appellants have not provided any documents (e.g., employment contracts, correspondence) to show that he was offered a permanent, or even an indefinite, position in Alaska, as opposed to a temporary position. In addition, appellants have not provided any evidence (e.g., real estate listing contracts, and/or third-party affidavits/declarations) to show that in 2013 appellants searched for a permanent home while in Alaska, or that appellant-wife attempted to sell (or actually sold) their California home while appellant-husband was working in Alaska.

Despite appellants’ contention that appellant-wife returned to California to “sell the family home,” the appeal record contains no documents (e.g., grant deeds, etc.) showing that appellants ever *owned* (as opposed to rented) a California home in 2013. In fact, in a statement attached to appellants’ supplemental brief, appellant-wife states that she gave notice to their California *landlord* that they would be out of their California home by October 1, 2013, which might indicate that appellants rented a California home throughout the 2013 tax year. Indeed, the evidence shows that appellants rented their California home and thus appellant-wife could not have returned to this state to make a sale as they apparently did not own any property. As such, we find appellants’ contention to be without merit. What is clear, however, is that

⁵ We note that appellants’ reply brief states in part: “Appellants’ opening brief contains an opening position substantiated by a declaration under penalty of perjury” The appeal record, however, does not contain a declaration signed by either appellant under penalty perjury.

appellants maintained a “home” (whether rented or owned) in California throughout the 2013 tax year.

We also note that appellant-wife continued to live in the California home while appellant-husband was working in Alaska, and both appellants later lived in the California home after appellant-husband returned to California. As indicated above, maintenance of a marital abode is a significant factor in resolving the question of domicile. (*Appeal of Bailey, supra.*) Appellants have also not provided any evidence (e.g., employment contracts, letters, emails, third-party affidavits/declarations) to show that appellant-wife quit her California job (or gave notice of an intent to quit) in 2013. In summary, appellants have not carried their burden of showing that they mutually (or alternatively, individually) abandoned their California domicile in 2013. Accordingly, we find that appellants were both domiciled in California throughout the 2013 tax year.

Because of our finding above that appellants were both domiciled in California throughout the 2013 tax year, each appellant will be considered a California resident for the entire tax year if his or her respective absence from California during the 2013 tax year was 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* (82-SBE-001) 1982 WL 11679.) The determination cannot be based solely on the individual’s subjective intent but instead must be based on objective facts. (*Appeal of Berner, supra.*)

⁶There 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 3 months.

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 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.*) As provided below, the *Bragg* factors can be organized into three categories. (*Appeal of Mazer, supra*.)

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

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

Other than appellants' unsupported assertions, appellants have not provided any evidence demonstrating that their absences from California during the 2013 tax year were for other than temporary or transitory purposes. Again, appellants have not provided any documents establishing that appellant-husband was offered a permanent, or even an indefinite, position in Alaska—as opposed to a temporary position. In addition, appellants have not provided any evidence showing that while in Alaska they established any significant connections. Further, as already discussed above, appellants have not provided any evidence demonstrating that in 2013 they searched for permanent home while in Alaska, or that appellant-wife attempted to sell (or actually sold) their California home while appellant-husband was working in Alaska. In fact, as noted above, appellant-wife continued to live in the California home while appellant-husband was working in Alaska, and both appellants lived in the California home after appellant-husband

returned to California. In addition, we note that appellants have not provided any evidence that appellant-wife quit her California job (or gave notice of an intent to quit) in 2013.

Given these circumstances, we must conclude that appellants’ closest connections were with California and that their visits to Alaska were for temporary or transitory purposes, and appellants have not shown otherwise. Accordingly, we find that appellants were California residents during the entire 2013 tax year, and appellants are subject to tax on appellant-husband’s income earned in Alaska.

HOLDING

Appellants were California residents for the entire 2013 tax year.

DISPOSITION

FTB’s action is sustained.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
E. L. Ewing
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Elliott Scott Ewing
Administrative Law Judge

DocuSigned by:
Keith T. Long
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Keith T. Long
Administrative Law Judge

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